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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature

OF THE
STATE OF INDIANA,
WITH TABLES OF CASES REPORTED AND CITED, AND STAT-
UTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Assistant Reporter.

VOL. 154,
CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1899, AND NOT
REPORTED IN VOLUME 153, AND CASES DECIDED
AT THE MAY TERM, 1900.

INDIANAPOLIS:
LEVY BROS. & CO., CONTRACTORS FOR THE STATE.
1900.

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Rec. Dec. 4, 1900

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. JOHN V. HADLEY. * ‡
HON. FRANCIS E. BAKER. † ‡
HON. ALEXANDER DOWLING. ‡
HON. LEANDER J. MONKS. †
HON. JAMES H. JORDAN. †

* Chief Justice at November Term, 1899.

† Chief Justice at May Term, 1900.

‡ Term of office commenced January 1, 1895.

‡ Term of office commenced January 1, 1899.

OFFICERS
OF THE
SUPREME COURT.

ATTORNEY-GENERAL,
WILLIAM L. TAYLOR.

REPORTER,
CHARLES F. REMY.

CLERK,
ROBERT A. BROWN.

SHERIFF,
GEORGE W. WEIR.

LIBRARIAN,
HOYT N. McCLAIN.



CASES
 ARGUED AND DETERMINED
 IN THE
Supreme Court of Judicature
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, NOVEMBER TERM, 1899, AND MAY TERM,
 1900, IN THE EIGHTY-FOURTH YEAR OF THE STATE.

WEAVER v. THE STATE.

[No. 18,897. Filed January 8, 1900.]

CONTINUANCE.—Absence of Witness.—Affidavit.—Criminal Law.—An affidavit for a continuance on account of the absence of a witness must affirmatively show that the applicant believes the facts to be true which he alleges he can prove by the absent witness. *p. 3.*

SAME.—Absence of Witness.—Affidavit.—Criminal Law.—An affidavit for a continuance on account of the absence of a witness, alleging that the applicant, who had been confined in jail for four months prior to the time of the trial, had placed in the hands of one of his attorneys the names of his witnesses, and the witness in question was not subpoenaed for the reason that the attorney was informed, as he understood, that a subpoena would be issued for said witness and sent to the sheriff of an adjoining county by another attorney does not show that due diligence was used to obtain the absent witness. *pp. 4-6.*

SAME.—Absence of Witness.—Affidavit.—Criminal Law.—An affidavit for a continuance because of the absence of a witness which does not show that there is any probability of procuring the testimony of the witness within a reasonable time is insufficient. *p. 6.*

CRIMINAL LAW.—Evidence.—Sufficiency.—Appeal and Error.—Where in the trial of one charged with larceny the evidence was of such a

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character as to warrant a reasonable conclusion that defendant was connected in some manner with the larceny, the Supreme Court will not reverse a judgment of conviction on the insufficiency of the evidence. pp. 6-9.

From the Sullivan Circuit Court. *Affirmed.*

John S. Bays, for appellant.

W. L. Taylor, Attorney-General, *C. C. Hadley*, *Merrill Moores*, *Rowland Evans* and *C. D. Hunt*, for State.

JORDAN, J.—Appellant, together with one Frank Weaver, was charged by indictment with the larceny of two bales of hay of the value of \$2, the property of James S. Leach. Upon a separate trial before a jury he was found guilty as charged, and, over his motion for a new trial, was sentenced to be imprisoned in the reformatory prison for an indefinite period within the limits of the statute defining petit larceny.

Appellant submits for our decision but two questions: (1) It is insisted by his learned counsel that the court erred in overruling his motion for a continuance; (2) that the judgment is not sustained by sufficient evidence.

The record discloses that on October 17, 1898, the day of the trial, appellant presented to the court his application for a postponement of the trial, and supported the same by his own affidavit. The cause alleged for a continuance was the absence of a material witness, and the facts which he desired to prove by this witness, and their materiality, are fully shown under the averments of the affidavit. This application the court denied.

Counsel for the State justify this ruling of the court for the reasons, as claimed, that the affidavit in support of the application for a continuance is insufficient in at least three respects: (1) That it does not appear therefrom that appellant believes the facts to be true which he alleged he could prove by the absent witness; (2) that it does not show that due diligence was exercised to obtain the evidence of the witness in question; (3) that it is not shown therein that

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there is any probability of procuring the testimony of the witness within a reasonable time.

Section 1850 Burns 1894, §1781 R. S. 1881, and Horner 1897, which relates to the postponement of a trial in a criminal cause, requires, among other things, that the affidavit made in support of the motion for a continuance shall show that due diligence has been used to obtain the absent evidence, and, when the continuance is sought on account of the absence of a witness, it must be shown that there is a probability of procuring the testimony of the witness within a reasonable time; and, further, that the defendant believes the facts to be true to which the witness will testify.

There is an entire absence in the affidavit in controversy of any direct averment or affirmative showing whatever that the defendant believes the facts to be true which he alleges he can prove by the witness in question. Such averment or affirmative showing was requisite in order that the affidavit might respond to the plain requirements of the above statute.

As a general rule, a party to an action, who seeks to postpone the trial thereof, is required clearly to show that he is entitled to such delay, and, where his application is governed by a positive statute, as in this case, before he can demand a continuance, as a matter of right, he must bring himself fully within the requirements of such statute; and the court will not indulge in any inferences or presumptions in aid of the motion or application. *Hubbard v. State*, 7 Ind. 160; *Morris v. State*, 104 Ind. 457.

Appellant alleged in his affidavit that the absent witness, Henry Wilford, "resides in the southwest part of Clay county, Indiana, within a short distance of the Sullivan county line." Upon the question relating to the exercise of due diligence by the defendant to secure the absent evidence, the following facts were averred in the affidavit: "And now said affiant shows unto the honorable court that he has used due diligence to obtain the presence of said witness in this: That, on the 11th day of the present

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month, said defendant, who is now, and has been for four months prior to this time, confined in the jail of Sullivan county, placed in the hands of one of his attorneys, J. R. Brown, the names of his witnesses to be used in the trial of said case as witnesses for and on his behalf, among said names being the above named witness, Henry Wilford.

"And now defendant shows unto the court that a subpoena was not issued for said witness, Henry Wilford, along [with] the subpoenas for the other witnesses, for the reason that one of the attorneys for the defendant, J. R. Brown, was informed (so he understood) that a subpoena would be issued for said witness and sent to the sheriff of Clay county by one Lee Fenton Bays, who at said time and is now assisting in the law office of his father, John S. Bays, one of the attorneys for the defendant in this case; and having so understood said Bays that he would have said subpoena so issued for said witness, he, said Brown, did nothing further toward subpoenaing said witness.

"And now said defendant says that said Lee Fenton Bays did not so understand that Brown was relying on him to so issue said subpoena, or have the same done."

It has been repeatedly held by this court that an affidavit for the postponement of a trial of a cause must clearly and satisfactorily disclose that the applicant, under the particular circumstances, has exercised due diligence to obtain the testimony of the witness on account of whose absence he seeks to delay the trial. Personal diligence of the party himself, or his agents or attorneys, or a sufficient excuse therefor, must be shown. As a general rule, in such cases, the negligence of the applicant's agents or attorneys must be charged to him. *Deming v. Patterson*, 10 Ind. 251; *Ward v. Colyhan*, 30 Ind. 395; *Miller v. State*, 42 Ind. 544; *McDermott v. State*, 89 Ind. 187; *Burchfield v. State*, 82 Ind. 580.

The diligence used by appellant to secure the evidence in question, or the excuse which he offers, is based upon the

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following facts: Prior to his trial, it seems that he had been confined in jail for about four months. On the 11th day of October, some six days before the day of the trial, which appears to have been commenced on October 17, 1898, he shows that he gave to one of his attorneys the names of the witnesses whom he desired to have subpoenaed to testify in his behalf, among the number being the name of the absent witness. His attorney seems to have omitted to have a subpoena issued for this witness, for the reason that he was informed, and understood, that a Mr. Bays, son of associate counsel, would attend to the matter of having the witness subpoenaed. Mr. Bays, it appears, did not understand that he was to discharge this duty, and hence omitted to have the subpoena issued. Certainly these facts do not constitute the diligence which the law exacts, neither do they show a sufficient excuse for the neglect to exercise the required diligence to secure the absent evidence. The mere fact that appellant was in jail during the time it was necessary for him to prepare for his trial is not alone sufficient. He seems to have been represented by counsel at the time he was confined in jail, and one of his attorneys undertook to discharge the duty of securing the evidence in question, but, by reason of the misunderstanding stated, failed to perform this duty. It does not appear that appellant, after giving the names of his witnesses to his attorney, made any inquiry to ascertain if any effort had been made, upon the part of the attorney, to secure the evidence which he desired on his trial, or gave any further concern in regard to the matter, but seems to have relied wholly upon his attorney.

If the delay of a trial in a criminal cause could be secured by the defendant for the reason alone that he was confined in jail, and thereby relied upon his attorneys to make the necessary preparations for his trial, which they failed to do, it would afford a convenient cause in many cases for the defendant therein to secure a delay of his trial. It is so clearly manifest that the affidavit is deficient upon the

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question of diligence that we may dismiss the proposition without further consideration.

Aside from the mere averment that the absent witness is a resident of Clay county, Indiana, there is nothing in the affidavit affirmatively to show, either by a direct averment or otherwise, that there is any probability of procuring his testimony within a reasonable time in the event the trial was postponed. It is evident that the affidavit is also defective in this respect. *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317; *Merrick v. State*, 63 Ind. 327. For the reasons stated, the affidavit in support of a continuance was insufficient, and therefore the court did not err in denying the motion.

The evidence upon which appellant was convicted is, in the main, circumstantial. The following may be said to be a summary of the principal part thereof. It appears that on November 7, 1897, appellant came to the home of his brother, Frank Weaver, in Sullivan county, Indiana. The larceny of the hay in question is shown to have been committed in said county on November 8th, the day following the arrival of the appellant at his brother's house. On the morning of November 8th, Frank Weaver borrowed a wagon from a neighbor. The latter testified upon the trial in behalf of the State, and stated that after Frank Weaver had borrowed the wagon in question he saw a team of two horses hitched to this wagon about noon of that day; that the wagon was standing in the road with the horses headed towards the west, and that he saw appellant and his brother Frank get into the wagon. The horses owned by Frank Weaver, it appears, were different in size, and when they were hitched to a wagon the smaller one was usually worked by Weaver on the "off side". The hay, which was the subject of the larceny, was stored in an old house or shed situated near the road on Mr. Leach's farm. Another witness testified that, about 3 o'clock in the afternoon of November 8th, he saw a wagon standing in front of the house or shed from which the hay was stolen. He saw one man sitting

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in the wagon, and the other one was standing on the ground some six or eight feet from the hay shed. He observed the latter party get into the wagon, and then they drove away. He passed the same wagon and men in the road afterwards, and recognized the two men in the wagon to be appellant and his brother, Frank Weaver, and spoke to them. The baled hay, which was stored in the house or shed in question, was "clover and timothy mixed". Leach, the owner of the hay, testified that on November 9th, about daylight, he discovered that some of his hay had been taken from this house or shed. The door to this house had been "spread open", and half of it was hanging on the hinges and the other half on the hook. He observed that hay had been scattered around on the ground outside of the house. It had rained on November 8th, and the ground was soft; and this witness further testified that he observed the track of a wagon, which apparently had been driven up the side of the road, and had been stopped near the hay house. He noticed the track of a man leading from the wagon to the hay house or shed and then leading back to the wagon. He also saw tracks made by horses. From these tracks the witness stated that one of the horses appeared to be small and the other of a medium size. He stated that on former occasions he had missed hay, and was positive in his statements that hay had been stolen from this shed on the occasion in question. Mr. Hummell, who was in the employ of Mr. Leach, also testified that on the morning of November 9th, after the loss of the hay had been discovered, he, about 8 o'clock, at the request of Mr. Leach, followed the tracks of the wagon and horses as they had been made in the mud at the hay shed. He followed these tracks, first a quarter of a mile east, then half a mile north, and then east on the public road until they led him to the residence of Frank Weaver, brother of appellant. At the latter's house he saw out in front two bales of hay, this hay being clover and timothy mixed. This witness also testified that one distinguishing feature of the

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tracks which he followed was that those made by the "off horse" were smaller than those made by the "near horse".

After appellant and his brother were jointly indicted upon the charge in question, the former was arrested in the public highway upon a warrant issued and placed in the hands of the sheriff. At the time of his arrest he attempted to make his escape by flight.

There are other facts and circumstances given in evidence, but we do not deem it necessary to set them out in this opinion as the abstract which we have given is sufficient. Appellant, as the record discloses, offered no evidence whatever to contradict or explain that given by the State, but was content, at the close of the State's evidence, to rest his case.

The evidence in this cause, to say the least, tends strongly to establish the guilt of the appellant. To recapitulate, it appears that he came to the home of his brother, Frank Weaver, the day before the larceny is said to have been committed. Frank, it appears, borrowed the wagon in question, and both he and appellant were seen together in this wagon about noon of November 8th, and also at the hay shed with the wagon about 3 o'clock of the afternoon of that day. The next morning, after the loss of the hay was discovered, wagon and horse tracks made in the soft ground were traced from the hay shed to the home of Frank Weaver, where the witness saw two bales of hay answering the kind said to have been stolen. The tracks of the horse on the "off side" appear to have responded to the size of one of the horses owned by Frank Weaver, and which, as the evidence shows, was usually driven by him on the "off side."

The evidence was of such a character or nature, in the absence of any contradiction or explanation thereof, as to warrant a reasonable and just conclusion that appellant was connected in some manner with the larceny in question. It was sufficient to satisfy the jury, and the honorable and conscientious judge who presided at the trial, of appellant's

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guilt. It can not be asserted that there is a failure of evidence upon any material point and, hence, we would not be justified in disturbing the judgment upon the ground that the evidence is not sufficient. Finding no error of law, the judgment is therefore affirmed.

MANNAN v. MANNAN ET AL.

[No. 18,561. Filed January 4, 1900.]

HUSBAND AND WIFE.—*Jointure*.—*Dower*.—*Election*.—Section 2504 Horner 1897 providing that where a pecuniary provision is made the wife in lieu of her right to one-third of the lands of her husband she shall make her election within one year after the death of her husband whether she will take such jointure or pecuniary provision, or whether she will retain her right to one-third of the lands of her husband does not require an assent in writing to such jointure when created. pp. 11-14.

SAME.—*Jointure*.—*Dower*.—*Election*.—Where a husband conveyed real estate to his wife which by the terms of the deed was in lieu of her interest in his lands, and the wife, after the death of the husband, with full knowledge of the provisions of the deed, occupied the real estate, received the rents and profits thereof, and claimed to own the same by virtue of said deed, she is bound by such acceptance, and cannot take a widow's share in lands devised by the husband to his children. pp. 14, 15.

SAME.—*Jointure*.—*Acceptance During Life of Husband*.—*Election*.—The oral acceptance by a wife during the lifetime of the husband of a pecuniary provision made her in lieu of her right to one-third of the lands of her husband will not deprive her of the right of election after the husband's death given by §2504 Horner 1897. p. 15.

From the Marion Circuit Court. *Affirmed*.

Willis Hickam and J. W. Williams, for appellant.

W. S. Sherley, J. C. Robinson and M. H. Parks, for appellees.

MONKS, J.—This action was brought by the children of William R. Mannan by his first wife against appellant, the second wife of said Mannan, and her children by him, to

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quiet the title to real estate owned by said Mannan at the time of his death, and for partition of said real estate. It was alleged in the complaint that said Mannan had in his lifetime conveyed to appellant, who was his second wife, 273.25 acres of real estate, described in the complaint, in lieu of all her right or claim in all his real estate and that she accepted said conveyance of said real estate and holds the title thereto, and claims to own the same by virtue of said deed; that said Mannan died the owner of 240 acres of real estate in Morgan county, and that appellant had no interest therein because she accepted the 273.25 acres in lieu of all her interest in the lands of her husband. Appellant filed a cross-complaint against the plaintiffs and her codefendants in the court below, claiming title to the undivided one-third of said 240 acres of real estate as the widow of said Mannan, and asked that her title thereto be quieted. A trial of said cause resulted in a verdict against appellant, and, over a motion for a new trial, a judgment was rendered against her.

The only error assigned calls in question the action of the court in overruling the motion for a new trial.

It is first insisted by appellant that the verdict of the jury is not sustained by sufficient evidence, and that the same is contrary to law. The evidence shows that William R. Mannan and appellant, Sarah J. Mannan, were married in August, 1855; that said Mannan was the father of seven children by his first wife, and seven children by said appellant, his last wife. At the time of her marriage to said Mannan appellant owned a tract of 120 acres of real estate, and \$2,500 in cash, which she turned over to her husband. He had the use of said land and money until his death in March, 1896. On September 4, 1880, said William R. Mannan executed a deed to his wife, said appellant, for 273.25 acres of real estate in Morgan county. It was stated in said deed that said conveyance was made in consideration of \$2,500, belonging to appellant, which came into the

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possession of her husband, the grantor, at the time of their marriage, and the use and control of the same, and as her dower in all of his real estate. Immediately after the description of the real estate is the following: "It is hereby agreed that the above real estate is to remain in the possession and control of said William R. Mannan during his lifetime." Said deed was duly recorded. Mannan, the grantor, remained in possession of said real estate until his death in March, 1896. Immediately after his death, appellant, with the full knowledge of said deed and its provisions, occupied said real estate, and received the rents and profits thereof, and claimed to own the same under and by virtue of said deed, and was in possession of said real estate under said deed at the time of the commencement of this action.

William R. Mannan died testate, and by his will devised all of his property, real and personal, to his children, except the amount of personal property allowed by law to appellant as his widow. On March 20, 1897, appellant filed in the clerk's office of Morgan county her election to take under the law, and not under said will. At the time Mannan executed said deed to appellant he owned the 240 acres of land in controversy, and he owned no other real estate at the time of his death. It is insisted by appellant that there is no evidence that at the time of the execution of said deed she signified, in writing indorsed upon or attached to said deed, her assent to receive the same in lieu of all her right and claim in the lands of her husband, as required by §§2661, 2665 Burns 1894, §§2500, 2504 R. S. 1881 and Horner 1897, and that, therefore, the verdict was contrary to law, citing *Randles v. Randles*, 63 Ind. 93. It is provided by §§2661, 2663, 2665 Burns 1894, §§2500, 2502, 2504 R. S. 1881 and Horner 1897, as follows: §2661 (2500) "Whenever an estate in lands shall be conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust for such intended wife, * * * or whenever, for the same purpose, a pecuniary provision shall be

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made for the benefit of the intended wife—the same shall be a bar to the right or claim of such wife in lands of her husband: Provided, The intended wife, at the time of the creation of such jointure, signified, in writing, indorsed upon or attached to the deed creating said jointure, her assent to receive the same in lieu of all right or claim of such wife in the lands of the husband.” §2663 (2502) “The jointure of the wife, if consisting of real estate, must not be less than a freehold estate in lands, to take effect, in possession or profit, immediately on the death of the husband.” §2665 (2504) “If before her coverture, but without her assent, or if after her coverture, any such jointure or pecuniary provision shall be assured or given for her jointure, in lieu of her right to one-third of the lands of her husband, she shall make her election, within one year after the death of her husband, whether she will take such jointure or pecuniary provision, or whether she will retain her right to one-third of the lands of her husband; but she shall not be entitled to both.”

It is settled in this State that an antenuptial agreement in writing executed between the prospective husband and his intended wife, that either or both will take on the death of the other a less interest in the real estate of the other than that given by law, is binding upon the parties thereto until vacated or set aside. *McNutt v. McNutt*, 116 Ind. 545, 2 L. R. A. 372, and cases cited; *Rainbolt v. East*, 56 Ind. 538, 26 Am. Rep. 40. At common law a wife could not be barred of her dower by an agreement entered into by her after marriage, and if she did enter into an agreement to accept a provision in lieu of dower she might after the death of her husband refuse to accept said provision, and claim her dower, but if she accepted the provision made in lieu of dower, and agreed thereto after the death of her husband, she was concluded. 3 Bacon's Abr. p. 227, 228, 232; 10 Am. & Eng. Ency. of Law (2nd ed.), 211; 11 Am. & Eng. Ency. of Law (2nd ed.), 92; Co. Litt. (B. & H. ed.),

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36b, §41. It is said in 3 Bacon's Abr., at p. 232, of §9, Henry 8, ch. 10: "If it be before marriage, she is sole, and as such, under no man's power; if after marriage, she takes a jointure in satisfaction of dower, she may waive it after her husband's death; but, if she enters and agrees thereto, she is concluded; for though a woman is not bound by any act when she is not at her own disposal, yet if she agrees to it after she is at liberty, it is her own act, and she cannot avoid it."

It has been held in Wisconsin, under a statute on this subject in all respects the same as ours, that, if such jointure or pecuniary provision be made before marriage, and without the assent of the intended wife signified in the manner required by law, or if made after marriage, she shall have one year after the death of her husband to make her election whether she will take such jointure or pecuniary provision, or take the share of his estate given by statute; that, such right of election being secured by statute, she could not by contract made during coverture deprive herself of such right. *Wilber v. Wilber*, 52 Wis. 298, 302, 9 N. W. 163; *Munger v. Perkins*, 62 Wis. 499, 504, 22 N. W. 511; *Leach v. Leach*, 65 Wis. 284, 291, 26 N. W. 754; see also *Townsend v. Townsend*, 2 Sandf. (N. Y.), 711; 10 Am. & Eng. Ency. of Law, 211.

It is unnecessary to determine in this case, however, whether or not, if a wife at the time of the creation of such jointure signified in writing indorsed upon or attached to the deed creating said jointure her assent to receive the same in lieu of all her right or claim as such wife in the lands of her husband, she could within one year after the death of her husband repudiate the same and elect to take the interest given by law in the lands of her deceased husband.

It is clear that §2665 (2504), *supra*, whether construed alone or in connection with the other sections of the act of which it forms a part, does not require an assent in writing to such jointure when created. If after and during her mar-

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riage any jointure or pecuniary provision shall be assured or given for her jointure, in lieu of her interest in the lands of her husband, and she does not assent thereto in writing, yet if after the death of her husband she accepts said jointure or pecuniary provision, she cannot also receive the interest in her husband's estate given by law to the widow. Said section expressly provides that she shall have one year after the death of her husband in which to elect whether she will take such jointure or pecuniary provision, or whether she will retain her right to the interest given a widow by law, but she shall not be entitled to both. It is evident therefore that the conveyance of said 273.25 acres to appellant merely put her to an election after the death of her husband either to accept the same or retain the interest given a widow by law in the lands of her deceased husband. 11 Am. & Eng. Ency. of Law, 92, and note 4.

In this case the evidence shows that appellant, within one year after the death of her husband, elected to and did take and accept the 273.25 acres of real estate conveyed to her as her interest in all the real estate of her husband. It is true that a part of the consideration was the \$2,500 received from appellant at the time of her marriage to Mannan, and the use of the same, but when she elected to take and accept said real estate she could only do so upon the conditions contained in the deed, that is, in satisfaction of the \$2,500, and the use thereof, and in lieu of her interest in the lands of her husband. She could not accept it as to one, and reject it as to the other. 11 Am. & Eng. Ency. of Law, (2nd ed.), 59, 60, 62. The fact that her husband cut the timber from the land conveyed after the conveyance, and thereby lessened its value, did not change the rule so as to permit her to accept the land as a payment of her husband's indebtedness to her, and reject the other condition. Neither was the value of the real estate conveyed to her at the date of the deed or after her husband's death material. Having made her election and accepted the 273.25

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acres of real estate under said deed within one year after the death of her husband, and with a full knowledge of all the facts, she is bound thereby, and cannot have the interest in the 240 acres in controversy given the widow by law. 3 Bacon's Abr. 232; 12 Am. & Eng. Ency. of Law (2nd ed.), p. 92, and note 4, p. 110; 1 Bishop on Law of Married Women, §§383, 384, 432, 433; §2665 Burns 1894, §2504 Horner 1897. W. C. Banta, a witness for appellees, testified over appellant's objection to facts showing that appellant had full knowledge of the deed to her when it was executed, and that the provisions thereof were satisfactory to her. This evidence was not for the purpose of showing a binding acceptance by appellant of said conveyance, but to show that she had full knowledge of its contents and the purpose for which it was executed. No oral acceptance by her at that time could deprive her of the right of election after her husband's death given by §2665 (2504), *supra*. Robert L. Mannan, a son of appellant, and a party to this action, was called to testify on behalf of appellant to the conversation between appellant and her husband at the time the deed was executed, in order to show that there was not an oral acceptance of said deed by appellant during the lifetime of the husband. It is not necessary to determine whether or not said Mannan was a competent witness, for the reason that, if he was, the error in not permitting him to testify to said fact was harmless. Appellant was examined before the trial, and testified to facts showing that she had full knowledge of said deed and its contents when executed and that after the death of her husband she claimed to be the owner of said real estate under said deed, and received the rents and profits thereof. This examination was read in evidence at the trial. If the testimony of Mannan had been admitted, and had shown that appellant did not accept the deed when executed, or at any time during the lifetime of her husband, the result of the trial would have been the same. The court instructed the jury that they should find for appellant, unless

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within one year after the death of her husband she elected to accept the conveyance of said real estate. Indeed, if the evidence of Mannan had been admitted, or if the evidence of Banta as well as the evidence of Mannan had not been admitted, it would not have been error for the court to have directed the jury to return a verdict against appellant. *Randles v. Randles*, 63 Ind. 93, cited by appellant, is not in point in this case. In that case one Peter Randles entered into an oral agreement with Mahala Randles, his wife, for a separation, by the terms of which, in consideration that said Mahala would never claim any interest whatever in her said husband's property, real or personal, and that she would live separate and apart from him for the remainder of their joint lives, and would in all respects support and maintain herself, the said Peter would on his part pay or cause to be paid to her the sum of \$6,400, which sum he then paid. After the death of said Randles his children brought said action for partition of the real estate of said deceased, and claimed that, under said contract, the widow had no interest therein, and this court held that said contract was invalid, and the widow was entitled to her interest in said real estate the same as if said contract had never been made. It was not alleged in the complaint in said case that the widow had within one year after the death of her husband elected to take the pecuniary provision mentioned in said oral contract in lieu of her interest as widow in her husband's real estate. The effect of an election by the widow after the death of her husband was not involved or decided.

Finding no available error in the record the judgment is affirmed.

Jordan, J., took no part in the decision of this cause.

Baltimore, etc., R. Co. v. City of Seymour.

BALTIMORE AND OHIO SOUTHWESTERN RAILWAY
COMPANY v. THE CITY OF SEYMOUR ET AL.

[No. 18,629. Filed January 5, 1900.]

154	17
157	685
154	17
171	702

DEDICATION.—Prescription.—Evidence.—Railroads.—In an action by a railroad company to restrain a city from paving a portion of its right of way claimed by defendant as part of a street, the city introduced in evidence a plat of the land filed by the owner showing city blocks laid off on either side of the railroad with an open space between the blocks and the line of the railroad with the words "Railroad Avenue" and the number 50 on one side of the line, and "O. & M. Railroad" and the number 68 on the other side. The width of the right of way was not indicated on the plat. It was shown that the owner of the land thereafter deeded to the railroad company an eighty-foot right of way through such land "as staked, marked, surveyed, and located;" that shortly after making the plat, and before executing the deed to the company, a public auction was held of lots abutting on Railroad avenue but there was no evidence that the bidders ever completed their purchases, or that the right of way was represented to them to be of less degree than absolute or of less width than eighty feet. *Held*, that the evidence failed to show a dedication of any part of the eighty-foot right of way as a street, either by grant or by acts *in pais*. *pp. 18-21.*

SAME.—Prescription.—Public Use.—The fact that a strip of railroad right of way within the limits of a city, used by the railroad company as a freight yard, was traveled upon by persons who had no immediate business with the railroad company as well as by persons in receiving and delivering their freight, furnishes no evidence of title in the city. *pp. 21-23.*

SAME.—Prescription.—Property Once Dedicated to Public Use.—Evidence.—In the trial of an action by a railroad company to enjoin a city from paving a portion of its right of way claimed by defendant as part of a street, it was error to admit in evidence the proceedings of the common council had in the year 1867 in reference to sidewalks and street gradings thereon, since cities had no power prior to 1891 to seize property previously taken for a public use. *p. 23.*

From the Jennings Circuit Court. *Reversed.*

E. W. Strong, O. H. Montgomery, C. W. McMullen and H. D. McMullen, for appellant.

W. K. Marshall and J. M. Lewis, Jr., for appellees.

Baltimore, etc., R. Co. v. City of Seymour.

BAKER, J.—Appellant's complaint alleges in substance that appellant is the owner of a parcel of ground forty feet wide on each side of the center of its main track through the city of Seymour, and that it and its predecessor, the Ohio and Mississippi Railway Company, have been in the continuous possession thereof for railroad purposes since 1852; that in May, 1897, the city, under an ordinance, contracted with its co-appellee, the Capitol Paving and Construction Company, to pave a portion of the right of way, about 700 feet in length and of the full width of eighty feet except the ground covered by the tracks; that the threatened seizure is unlawful because the city has no title to nor interest in any part of the right of way. A temporary restraining order was asked, and the final relief prayed for was a perpetual injunction. Each appellee filed a general denial. The city also filed a separate answer in one paragraph, averring an express dedication and a prescriptive right, claiming exclusive control of the ground in question except "so much thereof as is now occupied by plaintiff's railroad tracks", and asserting the legality of its proceedings. There was a general finding and judgment for appellees. The error assigned is the overruling of the motion for a new trial. The principal question presented is the sufficiency of the evidence to sustain the finding.

The evidence is substantially without conflict. In examining it, all legitimate inferences must be drawn in favor of appellees and against appellant.

Appellant proved that in 1852 there was no town where Seymour now lies; that the Jeffersonville, Madison and Indianapolis railroad then ran north and south through the site of the present city; that the vacant land was then owned by one Shields; that in 1850 a preliminary survey of the Ohio and Mississippi railroad was made from Cincinnati to St. Louis, crossing the J. M. & I. on the lands of Shields; that in 1851 the final survey was made and the center line of the main track was marked by stakes 100 feet apart; that in the summer and fall of 1852 work on marking and pre-

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paring the grade had begun on Shields's land; that on May 24, 1853, Shields deeded to the O. & M. Company an eighty foot right of way through his lands on the line "as staked, marked, surveyed and located"; that the main track was constructed on the center line as surveyed, and ever since has been maintained at the same place; that appellant succeeded to the title of the O. & M. Company; that appellant and its predecessor have continuously operated a railroad over the ground deeded by Shields, and have maintained thereon, in addition to the main track, a siding, telegraph poles, ditches, platforms, depot buildings, watch-houses, water-cranes, etc.; that appellees were asserting the claims and threatening to do the things set forth in the complaint and the city's special answer. This made out a *prima facie* case for appellant.

The court admitted no evidence in support of the defense of express dedication. A record of a plat, made by Shields, was offered as proof of express dedication, and was held incompetent for that purpose on the ground that the plat was not executed with the formalities entitling it to be recorded, but was admitted in support of the defense of prescriptive right or dedication implied from acts *in pais*. Appellees contend that the plat was properly executed, and that the record thereof should be considered for all purposes. It is not necessary to decide this, because, on the assumption that the plat was properly executed, it does not prove an express dedication of the lands in controversy. Appellees are seeking to pave a distance of two blocks, one to the east and one to the west of the J. M. & I. crossing. The original plat of Seymour was not signed by Shields. The recorder of Jackson county certified that Shields acknowledged the execution of the plat before him on November 27, 1852. When it was recorded does not appear. By this plat it is shown that blocks were laid off north of the O. & M. railroad, but none south. On October 19, 1858, Shields signed the original plat with certain additions thereto and acknowledged the whole. By this it appears that blocks south of the O.

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& M. and west of the J. M. & I. were added, but none east. Assume that the plat in this transcript was duly executed and recorded on November 27, 1852. It shows the two railroads, crossing substantially at right angles. Three city blocks are shown, one in the northeast angle marked "A", one in the northwest marked "K", and one in the southwest marked "O". The space in the southeast angle is open and unplatted. At the east side of block "A" appears Ewing street, extending south to, but not across or beyond, the O. & M. right of way. At the west side of blocks "K" and "O" is Chestnut street, extending across the O. & M. right of way. Between blocks "A" and "K" is an open space, in the center of which is a dotted line running north and south. On each side of this dotted line, and between it and the block lines, is a solid line parallel with the dotted line. These three lines are extended on beyond the O. & M. and past block "O". The O. & M. is marked in the same manner and as being apparently of the same width as the J. M. & I. Between blocks "K" and "O" is an open space, in the center of which is a dotted line running east and west. On each side of this dotted line and between it and the block lines, is a solid line parallel with the dotted line. These three lines are extended on beyond the J. M. & I. and past block "A". Just above these three lines are written the words "Railroad avenue", and just below "O. & M. railroad". The distances between these three lines are not given. Between them and block "K" is the number fifty; between them and block "O" is sixty-three. No scale appears upon the plat—no statement that it is drawn to any scale—no explanation as to the character or width of the J. M. & I. or of the O. & M. right of way. But the nature and extent of the O. & M. right of way, indicated indefinitely by Shields upon his plat, was made certain by his deed to the company. *City of Noblesville v. Lake Erie, etc., R. Co.*, 130 Ind. 1. Plainly Shields could not thereafter claim that he had dedicated as a street any part of the eighty foot

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right of way. The first conveyance of any lot abutting on "Railroad avenue" was made by Shields on October 24, 1854. That purchaser, and all others of later date, had notice from the plat itself that the O. & M. had some kind of a right of way, and of some width, at the place in question. If they had gone upon the ground, they would have seen that the company was in possession of some width of territory. And possession of part, under title or color of title, is possession of the whole.

There was testimony for appellees by one who was a spectator that Shields, shortly after making the plat in November, 1852, and before executing the deed to the company in May, 1853, held a public auction of town lots, at which three or four abutting on "Railroad avenue" were struck off. But there is no evidence that these bidders ever completed their purchases; that they bid believing that the O. & M. right of way, which was indicated on the plat, and part of which was occupied by the company, was less than eighty feet; that Shields or the company represented the right of way to be of less degree than absolute or of less width than eighty feet; that they did not have actual notice from Shields and the company that the right of way, marked on the plat without any designated width, was actually eighty feet upon the ground. The plat and the indicia on the ground made it their duty to inquire.

There is no evidence of acts by Shields other than his making the plat, his executing the deed to the company for the right of way, and his conveying the lots to purchasers, as stated. So, neither by grant, nor by acts *in pais*, did Shields dedicate as a street any part of the ground in controversy.

There is no claim that appellant or its predecessor in title ever made or attempted to make an express dedication of any part of its right of way as a street. The remaining question is whether or not the evidence affords any basis for the claim that the city has a prescriptive right to hold as a

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public street all the right of way except the portion occupied by the tracks.

There is no evidence whatever of any public use of that part of the right of way which lies east of the J. M. & I. crossing and south of the main track.

West of the J. M. & I. and south of the main track, a side-track extending past block "O" has been maintained from the beginning. From the south side of the main track to the south side of the side-track is fifteen feet. Ever since the road was built, the company has placed its freight cars on this side-track, and persons who had freight to send or receive have come with teams to load and unload the cars, using the portion of the right of way south of the side-track for a freight yard to drive in upon. Between the south line of the right of way and the north line of the lots in block "O" is a space of twenty-three feet upon the ground. By the plat and by use, this space is a public highway. But the public, as well as persons having business with the company, drove over that part of the right of way which was used for the purpose of loading and unloading cars. This use, however, was neither exclusive nor adverse, and furnishes no evidence of title in the city. *Shellhouse v. State*, 110 Ind. 509; *Nowlin v. Whipple*, 120 Ind. 596, 6 L. R. A. 159; *Pennsylvania Co. v. Plotz*, 125 Ind. 26.

Between the north line of the right of way and the south line of the lots in blocks "A" and "K" is a space of ten feet on the ground. North of the main track, the company has maintained a ditch, a line of telegraph poles, a water-crane, a tool house, and for a considerable time a platform that crossed to the north side of the right of way. Some of the structures and appliances on the right of way have been moved from time to time as the company saw fit. That others than those who had business with the company traversed part of the right of way, and that mud-holes were occasionally filled up by the city employes, are not inconsistent with the retention of title by the company. A mere

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permissive use, concurrent with the owner's, is not indicative of a prescriptive right.

A large part of the record is taken up with evidence of the number and character of buildings erected on lots abutting on the open spaces between the block lines and the right of way, and of the amount of business transacted therein. This was irrelevant. One need not object to what he can not stop.

To admit in evidence the common council's proceedings of September 12, 1867, in reference to sidewalks and street grading on "Cincinnati and St. Louis avenue" (which is a later name for "Railroad avenue"), was erroneous. It afforded no evidence of a right or of a claim of right to the railroad land. The right of way was indicated on the original plat of the city. "Railroad avenue" was outside of this. Prior to 1891 (Acts 1891 p. 122), cities had no authority to seize property previously taken for a public use. *City of Seymour v. Jeffersonville, etc., R. Co.*, 126 Ind. 466. There was no evidence that the company had notice of the proceedings, and it was not bound to take notice of them as they did not profess in any way to encroach upon the right of way.

The facts in this case differ essentially from those in *Pittsburgh, etc., R. Co. v. Town of Crown Point*, 150 Ind. 536. There, it was found that a portion of the station grounds, on the opposite side of the depot from the tracks, of the width of thirty feet, had been marked out, ditched, graded and worked by the town authorities for thirty years, and throughout that time the public's possession of the ground as a street had been open, notorious, continuous, adverse and exclusive.

It was error to receive oral testimony in regard to the meaning of the plat. *Miller v. City of Indianapolis*, 123 Ind. 196.

Judgment reversed, with directions to sustain the motion for a new trial.

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154	24
159	139

154	24
161	610
162	103

WABASH RAILROAD COMPANY v. YOUNG.

[No. 18,788. Filed January 5, 1900.]

JUDGMENTS.—Review.—Complaint.—Exhibits.—A complaint to review a judgment must state enough of the pleadings or the nature or character thereof to present the question of the alleged error without resorting to the exhibits filed with the complaint. *pp. 24-26.*

SAME.—Review.—Complaint.—A complaint to review a judgment for error of law must specifically set forth the ruling of the court relied upon as error, and the facts upon which such ruling is based. *pp. 26, 27.*

From the Miami Circuit Court. *Reversed.*

W. V. Stuart, E. P. Hammond, D. W. Simms, E. P. Hammond, Jr., R. J. Loveland and H. P. Loveland, for appellant.

D. E. Rhodes, for appellee.

HADLEY, C. J.—On the 13th of December, 1897, appellee filed his complaint in the Miami Circuit Court to review a former judgment of that court rendered in an action wherein he was plaintiff, and the appellant defendant.

The complaint charged that in October and December, 1895, the plaintiff filed his complaint against the defendant for the recovery of damages for being prevented by the defendant from obtaining and keeping employment; and that afterwards, in October, 1897, upon leave of court, he “filed amended first and second paragraphs of complaint in the words and figures following:” Here follows what purports to be two paragraphs of complaint. And the complaint proceeds: “To which amended complaint, so filed by said plaintiff, defendant demurs in the following words and figures:” Here follows what purports to be a separate demurrer to each paragraph of the complaint. The complaint then further proceeds: “That on Wednesday, October 20, 1897, the following proceedings were had in said cause, which is a copy of the record contained in order-book forty-three at

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page 507". Then follows the minutes of the court, which, among other things, recite: "Comes now the plaintiff, and by leave of court files an amended complaint in three paragraphs in the words following: (Here insert.) And now the defendant files a demurrer to the amended complaint in these words: (Here insert.) And the court sustains the demurrer to the amended complaint, to which ruling the plaintiff excepts, and, refusing to plead further, judgment is rendered against him", from which he prays an appeal; and, after further reciting the judgment rendered against the plaintiff, the complaint continues: "Plaintiff files herewith a copy of the first and second paragraphs of said amended complaint and makes them a part of this complaint and marks the first paragraph A, and the second paragraph B. He also files herewith a copy of the defendant's demurrer to said amended complaint, marked Exhibit C, and files herewith, as a part hereof, a copy of the record of the judgment in said cause, and marks it Exhibit D. Wherefore plaintiff asks a review of the judgment and proceedings in said cause, and for all proper relief." To this complaint appellant's demurrer was overruled, and, refusing to answer over, judgment was accordingly rendered against it, from which this appeal is prosecuted.

The sufficiency of the complaint is the only question properly before us. The complaint is wholly bad. Stripped of its formal parts, and its reference to the pleadings in the former case, it amounts to this: That, in 1895, the plaintiff filed his complaint against the defendant for damages for being prevented by the defendant from obtaining and keeping employment; that, on the 20th day of October, 1897, upon leave of court, he filed amended first and second paragraphs of complaint, and on the same day filed an amended complaint in three paragraphs, to which amended complaint the defendant filed a demurrer. Wherefore the plaintiff asks a review of the judgment and proceedings in said cause, and for all proper relief. An action to review a judgment

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can only be maintained by filing a complaint. A complaint is defined to be "A statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." §341 Burns 1894, §338 Horner 1897.

Without recourse to what is alleged to be copies of two paragraphs of complaint, of a demurrer, and an order-book entry, the court is without information concerning the plaintiff's grievances against the defendant, or the grounds of the defendant's demurrer, or the action of the court thereon, or the nature of the judgment, or whether the plaintiff excepted to the rulings of the court. The allegation that the following is a copy falls far short of an averment that the recitals of the copy are facts. It was held in *Davis v. Davis*, 145 Ind. 4, that all averments essential to the validity of a complaint must be set out in the body thereof, and not by reference to exhibits, or the same will not be sufficient to withstand a demurrer thereto; and, applying this doctrine to a complaint to review a judgment, it was said, in *Jamison v. Lake Erie, etc., R. Co.*, 149 Ind. 521 at page 524: "We think the complaint should have stated so much of the complaint and answer, or the substance or nature or character thereof, as was necessary to present the question of the alleged error without resorting to the exhibit filed with the complaint." See *Travelers Ins. Co. v. Prairie School Tp.*, 151 Ind. 36. But aside from the effect of incorporating in the complaint copies of the former pleadings and record is the graver question, namely: The total absence of any averment that error was committed in the former proceedings, or that either of the statutory grounds for a review existed. If no error of law had been committed, and no new matter discovered, the plaintiff had no right to a review, and, before he can proceed, he must state the grounds of his injury. It is therefore essential to a complaint for review of a judgment for error of law that it specifically set forth

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the ruling of the court relied upon as error and the facts upon which such ruling is based (*Findling v. Lewis*, 148 Ind. 429), and that the plaintiff, at the time of such ruling, excepted thereto, *American Ins. Co. v. Gibson*, 104 Ind. 336, and cases cited.

Appellant insists that we consider a second reason why its demurrer to the complaint should have been sustained, namely: Because neither paragraph of the amended complaint in the judgment reviewed states facts sufficient to constitute a cause of action, the insistence being that the question will probably arise in a future stage of this case. If proper to do so, we could not, under this record, determine the sufficiency of the complaint in the former case, because it nowhere appears in the record. It is first charged in the complaint that the plaintiff, in 1895, filed his complaint, and on October 20, 1897, filed his amended first and second paragraphs of complaint, following which there is set out what is called, first, "A complaint for damages" in one paragraph, at September term, 1895, and second, an "Amended complaint" in one paragraph, at September term, 1897. It is next averred in the complaint that on Wednesday, October 20, 1897, the following proceedings were had in said cause, as contained in order-book forty-three at page 507. Then follows among other things: "Comes now the plaintiff, and by leave of court files an amended complaint in three paragraphs (Here insert.), and the defendant files a demurrer to the amended complaint (Here insert.), which is sustained, and the plaintiff excepts."

Neither paragraph of the amended complaint in the former case is set out in the complaint in this case. It is alleged that a copy of the first and second paragraphs is filed herewith and made a part hereof, marked Exhibits A and B, but no such exhibits appear anywhere in the record. The record, therefore, affirmatively shows that the complaint, upon which the judgment reviewed was based, is not in the record. Judgment reversed, with instructions to sustain appellant's demurrer to the complaint.

Goldsmith v. Chipps.

GOLDSMITH ET AL. v. CHIPPS.

[No. 19,009. Filed January 5, 1900.]

PRACTICE.—Pleading.—Defective Demurrer.—Abatement.—Where the facts stated in an answer in abatement were insufficient to abate the action, the action of the court in sustaining a demurrer thereto was harmless, although the demurrer was so defective in form that it could have been disregarded by the court. *pp. 28, 29.*

PLEADING.—Demurrer to Answer in Abatement.—A demurrer to an answer in abatement does not search the record, and cannot be carried back and sustained to the complaint. *p. 29.*

From the Vanderburgh Superior Court. *Affirmed.*

S. R. Hornbrook, W. M. Wheeler and E. Q. Lockyear, for appellants.

A. L. Doss, J. T. Walker and J. T. Cutler, for appellee.

MONKS, J.—Appellee recovered a judgment and decree of foreclosure in the court below. Appellants Goldsmith and Goldsmith filed, at the proper time, an answer in abatement in two paragraphs, and appellee's demurrer thereto was sustained as to the first paragraph, and overruled as to the second. Appellants insist that the court erred in sustaining the demurrer to the first paragraph of the answer in abatement for two reasons: "(1) The demurrer is a joint demurrer, and challenges the answer in abatement as an entirety, and not each paragraph separately; (2) the form of the demurrer is deficient in this,—that the grounds are that the facts stated in neither of said paragraphs of said plea are sufficient to avoid plaintiff's complaint herein filed."

It will be observed that appellants do not claim that the facts stated in said first paragraph of answer in abatement were sufficient to abate the action, but only that the same was not, for the reason stated, challenged separately by the demurrer filed. If the facts stated in said first paragraph were insufficient to abate the action, as we think they were, and which appellants admit by their failure to urge the

154	28
154	321

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154	28
167	68
167	381

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sufficiency thereof, the action of the court in sustaining the demurrer thereto was harmless, even if the demurrer failed to challenge separately the sufficiency of said paragraph, and was so defective in form that it could have been disregarded by the court. *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 378; *Blue v. Capital National Bank*, 145 Ind. 518; *Board, etc., v. Gruver*, 115 Ind. 224, 231; *Palmer v. Hayes*, 112 Ind. 289, 291; *Hildebrand v. McCrum*, 101 Ind. 61, 64, 65.

A demurrer to an answer in abatement does not search the record, and can not be carried back and sustained to the complaint. *Indiana, etc., R. Co. v. Foster*, 107 Ind. 430, 432, and cases cited; 6 Ency. Pl. & Pr. 332.

Judgment affirmed.

KERN v. KERN ET AL.

[No. 18,720. Filed January 9, 1900.]

EVIDENCE. — *Privileged Communications. — Attorney and Client. — Wills.*—Communications between a testator and his attorney in reference to the testator's will which was drawn by such attorney, are not privileged after the death of the testator. *Gurley v. Park*, 135 Ind. 440, overruled in part. pp. 32-35.

WILLS.—*Revocation by Execution of Inconsistent Will.*—The execution of a will inconsistent with a former will executed by the testator operates to revoke the first will. p. 37.

SAME.—*Revocation. — Revival. — Lost Will.*—Where a will has been revoked by the execution of a second will, and upon the death of the testator the second will cannot be found, the fact that the first will is found in a conspicuous place with valuable papers does not constitute a republication and revival of the first will. pp. 37, 38.

From the St. Joseph Circuit Court. *Reversed.*

N. L. Agnew, D. E. Kelly and T. E. Howard, for appellant.

A. L. Brick and Stuart McKibbin, for appellees.

DOWLING, J.—This was an action to contest a will. It was tried by the court without the intervention of a jury, and a finding was made in favor of the appellees, who were

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154	29
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the defendants below. Over a motion for a new trial the court rendered judgment upon the finding. The contestor appealed, and the decision of the court overruling appellant's motion for a new trial is the error assigned. The contestor was the mother of the testator. The widow and other beneficiaries under the will were the defendants.

The facts set out in the complaint are, in substance, as follows: On the 20th day of September, 1897, Amon S. Kern died in the city of South Bend, St. Joseph county, Indiana, leaving an estate of the value of \$75,000 in real and personal property, situated in said city of South Bend. He left surviving him no children, and no father, his only heirs at law being his mother, who is the appellant, and his widow, Ella Kern. On the 24th day of September, 1897, an instrument purporting to be the last will and testament of the said Amon S. Kern, and bearing date of April 6, 1890, was admitted to probate in the St. Joseph Circuit Court, in said St. Joseph county, Indiana, then in session. By the terms of said will the whole estate was devised and bequeathed to the widow of the said testator, subject to a residuary bequest to three other relatives, one of whom died without descendants before the said Amon S. Kern. The appellant, as the mother of the said Amon S. Kern, is by law entitled to inherit the undivided one-fourth of his estate, and the said Ella Kern, as the widow of the said Amon S., is entitled to take the undivided three-fourths of his estate, if the said Amon S. Kern died intestate. The supposed will of April 6, 1890, was invalid, and was wrongfully admitted to probate, for the reason that it was revoked by a subsequent will, duly executed in 1894, by the said Amon S. Kern, either expressly or by an inconsistent disposition of his estate. Prayer that the probate be set aside, etc. The complaint was duly verified, and an undertaking for costs was given, as required by the statute.

The defendants appeared, and filed a joint answer in denial. By consent, the cause was submitted to the court,

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and, as has been stated, the trial resulted in a finding and judgment sustaining the will of 1890.

The grounds of appellant's motion for a new trial were, that the finding was contrary to law, and was not sustained by sufficient evidence, and that certain errors of law occurred on the trial in the rulings of the court in striking out evidence given for the appellant.

On the trial, Andrew Anderson, a witness for appellant, testified that he was a practicing lawyer of South Bend, Indiana; that he was acquainted with Amon S. Kern; that Kern was dead; that some three or four years before the date of the trial Kern came to the office of witness, and said that he wanted to make a will disposing of his estate; that witness thereupon called Mr. Bast, who was his stenographer, and dictated the will to him; that the stenographer brought the will into the front room of the office; that Mr. Kern signed it, and that he (Anderson) and Bast signed it as witnesses. Kern paid witness for his services, and carried the will away with him. Witness never saw it afterwards. Kern lived in South Bend. He owned a store. He was married, and he left as his widow the lady who was his wife when the will was executed.

After proof by another witness that the will drawn by Anderson, and executed by Kern, could not be found after Kern's death, the witness, Anderson, was asked to state the contents of that will. The question was objected to for the reason that the contents of the will were made known to Anderson as a privileged communication, notwithstanding the fact that the attorney became a subscribing witness to the will at the request of the testator. The court, not being prepared to pass upon the question raised by the objection, permitted the witness to state the contents of the will, but held the evidence under advisement. Anderson stated that, in the first part of the will, Kern disposed of all his estate in the following manner. Provision was made for his wife equivalent to one-third of his estate, and, in addi-

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tion thereto, he gave her the use of the dwelling-house in which he lived; the remainder of the estate was devised to two brothers. The entire estate was given away. He made his brothers his residuary legatees.

Robert W. Bast, the stenographer in the office of Anderson, who took down the will in shorthand and afterwards reduced it to print, and who, also, was a subscribing witness to the will, was asked to state the contents of the will. The question was objected to upon the ground that the communication was a privileged one as to Anderson, the attorney, and that the privilege extended to the knowledge acquired by the witness as the law clerk of Anderson. The objection was overruled, and the witness testified substantially as Anderson had done.

Appellant gave in evidence the will of Amon S. Kern, dated April 6, 1890, with the probate of the same, whereby the testator devised the whole of his estate to his wife, Ella Kern, subject to a residuary interest in one-half of what might remain at her death devised to three nephews. Ella Kern was nominated as sole executrix. Other evidence was introduced by appellant, but it is not necessary that we should set it out.

The plaintiff below having rested, the defendants introduced evidence as to the finding of the will of 1890, and the ineffectual search for the will prepared by Anderson.

At this point, the court announced its decision upon the objections to the testimony of Anderson and Bast, and struck out all of the evidence relating to the contents of the will drawn by Anderson.

The question is presented, whether communications between a testator and his solicitor or attorney, in reference to the testator's will, are privileged after the death of the testator, in a contest between his heirs at law and the beneficiaries under the will.

The statute of this State, in regard to confidential communications made to an attorney in the course of his pro-

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fessional business, and as to advice given in such cases, has not changed the rule of the common law. §505 Burns 1894, §497 Horner 1897. This rule does not apply to testamentary dispositions where the controversy is between the heirs and devisees of the testator. In such cases it is said that the very foundation upon which the rule proceeds seems to be wanting. The leading case upon this subject is *Russell v. Jackson*, 9 Hare 387, in which Lord Justice Turner says, that, "The disclosure in such cases can affect no right or interest of the client. The apprehension of it can present no impediment to the full statement of his case to his solicitor, * * * and the disclosure, when made, can expose the court to no greater difficulty than presents itself in all cases where the courts have to ascertain the views and intentions of parties, or the objects and purposes for which the dispositions have been made."

In Hageman's Priv. Com., §86, the rule laid down in *Russell v. Jackson*, *supra*, is concisely stated thus: "*That communications between a testator and his solicitor in reference to the testator's will, are not privileged after the death of the testator: contra as to communications between the same solicitor and the executors.*"

Russell v. Jackson, *supra*, is cited with approval in Wharton on Evidence, and, in treating upon the subject of professional privilege, it is said: "The privilege, it should also be remembered, is meant to protect the living in their business relations, and cannot be invoked when the question arises as to the intention of a deceased person in respect to the disposition of his estate." Wharton on Ev. (3rd ed.), §591.

In *Graham v. O'Fallon*, 4 Mo. 338, it is said, that an attorney who draws up a will is entirely competent to testify to its contents in order to set it up as a lost will, and his testimony is not subject to the objection that it discloses the confidential communications of a client.

This view of the rule as to such communications, and the

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competency of the solicitor to testify to them, is sustained by the decisions in the following, among other cases: *Blackburn v. Crawfords*, 3 Wall. (U. S.), 175, 18 L. Ed. 186; *Scott v. Harris*, 113 Ill. 447; *Sheridan v. Houghton*, 6 Abb. N. Cas. 234, 16 Hun 628; *Pence v. Waugh*, 135 Ind. 143; *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 17 L. R. A. 188.

It is urged, however, on behalf of the appellee, that this court has held that evidence of this character is inadmissible, and we are referred to the cases of *Gurley v. Park*, 135 Ind. 440, *Pence v. Waugh*, *supra*, *Brown v. McAlister*, 34 Ind. 375, and *Turner v. Cook*, 36 Ind. 129, as authorities supporting this view.

Gurley v. Park, *supra*, was an action to set aside a will on account of the unsoundness of the mind of the testatrix, and because its execution was procured by undue influence. The court say, on page 442: "In *Heuston v. Simpson*, 115 Ind. 62, it was said: 'The law forbids the physician from disclosing what he learns in the sick room, no matter by what method he acquires his knowledge.' See other authorities cited in the same case; also *Pennsylvania Co. v. Marion*, 123 Ind. 415.

"For a similar reason the evidence offered by the attorney who drew the will was properly excluded.

"In *Jenkinson v. State*, 5 Blackf. 465, it was held that when an attorney is consulted on business within the scope of his profession, the relation of attorney and client exists, and the communications on the subject between him and his client should be treated as strictly confidential. And this ruling has always been adhered to by this court. *Bigler v. Reyher*, 43 Ind. 112.

"The client may waive the privilege, but otherwise it is inviolate. *Pence v. Waugh*, 135 Ind. 143; *Bank, etc., v. Mersereau*, 3 Barb. Ch. (N. Y.), 528."

While the rule announced by the court in *Gurley v.*

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Park, supra, is doubtless the correct one in disputes between the client's representatives on the one hand, and strangers on the other, we do not think it applies where both the litigating parties claim under the client. The attention of the court does not appear to have been called to this distinction, and none of the cases bearing upon it is referred to in the opinion. We regard this qualification of the general rule as a very material one, and, to the extent that the opinion in *Gurley v. Park, supra*, conflicts with the view we have expressed, that case is overruled.

In *Pence v. Waugh*, 135 Ind. 143, it was held that, by selecting the attorney who drew the will as one of the subscribing witnesses, the client waived the objection to the competency of the witness arising from the professional relation such witness sustained to the client. In the opinion, the court cites, in support of its conclusions, the decision *In re Coleman*, 111 N. Y. 220, 19 N. E. 71, and *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765. The court says, in the course of the opinion: "The privilege of the statute requires no express waiver in this State, and it may be waived not only by express waiver, but by implication." This case lends no support to the position of counsel for appellees.

The cases of *Brown v. McAlister*, 34 Ind. 375, and *Turner v. Cook*, 36 Ind. 129, decide, only, that it is not necessary to the due execution of a will that the testator should in any manner indicate to the witnesses who attest it that the instrument is the will of the person executing it.

The next question we are called upon to determine is the legal effect of the revocation by the testator of the will of 1894. Was the will of 1890 thereby revived?

There is no doubt that at common law the revocation of a subsequent inconsistent will, revoking a former will, operated to revive the former, when such former will was not destroyed by the testator. In *Harwood v. Goodright*, 1 Cowp. 87, 92, Lord Mansfield said: "If a testator makes

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one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former; if he afterwards destroy the revocation, the first will is still in force and good."

In 29 Am. & Eng. Ency. of Law, 288, it is said: "Where the latter of two inconsistent wills was revoked by the testator in his lifetime, it was held by the courts of common law that the earlier will was thereby revived, and, unless afterwards revoked by some subsequent act, came into operation on his decease, whether the later will contained an express clause of revocation or not. In the ecclesiastical courts it was held that the revocation of the later will raised no presumption in favor of the revival of the earlier will, but that the question depended upon the intention of the testator as shown by the peculiar facts and circumstances of the case, and was open to decision either way. The statute of Victoria abolished the doctrine by expressly providing that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the reëxecution thereof, or by a duly executed codicil showing an intention to revive the will. In several of the States similar statutes exist, under which the revocation of the second will does not revive the first, unless such intent appear in the terms of the revocation, or the first will be duly republished afterwards. In the absence of such legislation the rule varies greatly in different states."

Commenting on this subject, it was well said by Burks, J., in *Rudisill v. Rodes*, 29 Gratt. (Va.), 147, 149: "The effect of the rule in the law courts was to exclude arbitrarily all extrinsic evidence of intention upon the question of revival, and thus oftentimes, to set up a will contrary to the intention of the testator; while the rule in the ecclesiastical courts threw the door wide open to the admission of such evidence, and suffered the intention of the testator to be determined by 'the uncertain testimony of slippery memory.' It was the object of the English statute, by the 22nd sec-

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tion, to abrogate both of these rules, which were attended with the mischiefs just indicated, and to establish in their stead a safer rule, by which the intention of the testator would be manifested with more certainty, and be less liable to be defeated by acts and circumstances of an equivocal character."

The statutes of this State establish the rule governing this case. §2729 Burns 1894, §19, 2 R. S. 1852, p. 308, §30 R. S. 1843, p. 491.

The provision of the statutes to which alone we must look declares that: "No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed, subscribed and attested as required in the preceding section. And if, after the making of any will, the testator shall execute a second, a revocation of the second shall not revive the first will, *unless it shall appear by the terms of such revocation to have been his intent to revive it, or, unless after such revocation he shall duly republish the previous will.*" §2729 Burns 1894, §2559 R. S. 1861 and Horner 1897.

The execution by Kern of the will of 1894, which made a disposition of his estate inconsistent with that of the will of 1890, operated to revoke the first will. *State v. Crossley*, 69 Ind. 203; *Burns v. Travis*, 117 Ind. 44.

The will of 1894, having been in the possession of the deceased, and not having been found after the death of Kern, the presumption is that it was destroyed by him *animo revocandi*. *McDonald v. McDonald*, 142 Ind. 55; *Goods of Mitcheson*, 32 L. J. N. S. (P. & M.) 202.

The first will having been effectually revoked, it could be revived only (1) by a writing executed by him for that purpose, signed, subscribed, and attested, as in the case of a last will; or, (2) by due republication of such previous

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will. There is no claim on the part of appellees that any such writing was executed, and it cannot be said that there was proof of the republication of the will of 1890. The preservation of the will of 1890, and the fact that it was found in a conspicuous place among the valuable papers of the deceased, did not constitute a republication. No oral declaration by the decedent, or other unequivocal act indicating an intention to republish the will of 1890 was shown. Schouler on Wills, §§441, 442, 444, 445; *Abney v. Miller*, 2 Atk. 593; *Barker v. Bell*, 46 Ala. 216; *In re Lones*, 108 Cal. 688, 41 Pac. 771; *Wolf v. Boilinger*, 62 Ill. 368; *Beaumont v. Keim*, 50 Mo. 28.

We conclude, therefore, that the will of 1890 was not republished, or otherwise revived, by any act of the decedent, within the meaning of §2729 of the statute.

We have carefully examined the cases of *Randall v. Beatty*, 31 N. J. Eq. 643, *Flintham v. Bradford*, 10 Pa. St. 82, *Neff's Appeal*, 48 Pa. St. 501, *Peck's Appeal*, 50 Conn. 562, *Cheever v. North*, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, and all other authorities referred to in the several briefs of counsel for appellees. There is a conflict among the decisions upon the questions arising in this case, but the great weight of authority seems to sustain the views we have expressed.

For the error of the court in striking out the evidence of Anderson and Bast, and for the reason that the finding of the court was contrary to law, the judgment is reversed.

 WHISENAND ET AL. v. BELLE ET AL.

[No. 18,872. Filed January 11, 1900.]

COUNTY COMMISSIONERS.—*Appeal.—Abandonment of Appeal.—Dismissal.*—An appeal to the circuit court from the action of the county commissioners in the establishment of a free gravel road was properly dismissed, where after filing an appeal bond the appellants instituted an action to enjoin the construction of the

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road and delayed taking any further steps to perfect their appeal for a period of ten months. *pp. 39-42.*

APPEAL AND ERROR.—*Record.*—The Supreme Court will not reverse the action of the circuit court in dismissing an appeal from the proceedings of the county commissioners establishing a free gravel road on account of the insufficiency of the affidavit and appeal bond where the affidavit is merely copied in the record by the clerk without a bill of exceptions or order of court. *pp. 42, 43.*

From the Monroe Circuit Court. *Affirmed.*

H. A. Lee, I. M. Grimes, J. E. Henley and J. B. Wilson,
for appellants.

JORDAN, J.—Proceedings in this cause were instituted in February, 1896, upon the petition of appellees to the board of commissioners of Monroe county, Indiana, to secure the construction of a free gravel road or pike, under the provisions of an act of the legislature passed in 1893, as amended in 1895 (Acts 1893, p. 196, Acts 1895, p. 143).

Such steps were taken before the board of commissioners upon said petition as resulted in an election being held in Clear Creek township in said county, at which election a majority of the qualified electors voted in favor of said improvement, and thereupon the board, on April 23, 1896, made a final order for the construction of said road. Appellants, who apparently were strangers to the proceedings before the board of commissioners, undertook to appeal from said final order to the Monroe Circuit Court, under §7859 Burns 1894, §5772 R. S. 1881 and Horner 1897, which authorizes an appeal to the circuit court from any decision of the board of commissioners by an aggrieved person not a party to the proceedings upon his filing in the office of the county auditor his affidavit showing that he is aggrieved by such decision, and disclosing therein that he has an interest in the matter decided.

Sections 7860 Burns 1894, §5773 R. S. 1881 and Horner 1897, provides that such appeal shall be taken in thirty days after the decision, by the appellant filing with the

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auditor of the county a bond with sufficient penalty and sureties to the approval of such auditor, etc. Section 7861 Burns 1894, §5774 R. S. 1881 and Horner 1897, provides that the auditor shall, within twenty days after the filing of such appeal bond, make out a complete transcript of the proceedings of the board relating to the proceedings appealed from, and shall deliver the same, and all papers and documents filed, and the appeal bond, to the clerk of the court to which the appeal is taken.

It is disclosed by the entry of the clerk of the lower court that appellants, on March 17, 1897, filed in the office of said clerk a transcript of the proceedings had before the commissioners, together with the original papers filed in said cause, and also an affidavit and appeal bond filed therein; which transcript, papers, affidavit, and bond, it is stated in said entry, "are in the words and figures as follows, to wit:" Here follows in the record a transcript of the proceedings in said cause before the board of commissioners. This transcript, however, in no manner recites or shows the filing of any affidavit by appellants for an appeal in the office of the auditor; neither does it show that any appeal bond was filed with and approved by said official. In respect to these matters, the transcript certified to the circuit court by the auditor is entirely silent. At the close of this transcript appears the certificate of the county auditor, bearing date of March 10, 1897, whereby he certifies "That the foregoing is a true and complete transcript of all the papers, proceedings, and judgment of the board of commissioners in said cause, etc., as the same appears from the files and records of my office." Following this certificate, the clerk has copied two certain documents, one of which purports on its face to be an appeal bond; the other professes to be an affidavit for an appeal from the decision of the board to the circuit court.

After the cause was docketed in the lower court, appellees, in response to the summons of the court, appeared in

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said action and filed their motion to dismiss the appeal, assigning therein numerous reasons why the said appeal ought to be dismissed, among which are the following: (1) For the reason that an appeal bond was filed on May 19, 1896, and the transcript was not filed with the clerk of the circuit court until March 17, 1897; (2) that the affidavit is not sufficient; that it does not show that appellants are aggrieved, etc.; (3) that the appeal bond was not filed in time; (4) for the reason that the record shows that appellants, after filing their appeal bond, commenced proceedings in the circuit court to enjoin the construction of said road or pike; that they secured a temporary restraining order, which, upon appeal to the Supreme Court, was reversed; and said injunction proceedings, after said reversal, were decided in the lower court adversely to appellants.

The court, over appellants' exceptions, sustained this motion and dismissed the appeal, and granted appellants ten days in which to file a bill of exceptions. The latter filed their bill of exceptions within the time allowed. This bill embraces the motion to dismiss, and the ruling of the court thereon. It further appears from said bill that, upon examination by the court of the files and records of the Monroe Circuit Court, it was disclosed that plaintiffs (appellants herein), John P. Harrell, and others, on May 26, 1896, commenced proceedings in the Monroe Circuit Court to enjoin the construction of said pike, and secured from the court a temporary injunction enjoining the board of commissioners of said Monroe county from in any manner proceeding in the construction of said improvement. From the judgment awarding this temporary injunction, the bill of exceptions shows that the board of commissioners appealed to the Supreme Court, and, on February 23, 1897, that this court reversed the judgment of the Monroe Circuit Court; that on April 23, 1897, the Monroe Circuit Court sustained a demurrer to the complaint in said action for an injunction, and rendered judgment against appellants for costs.

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The only error assigned by appellants in this appeal is that the court erred in dismissing their appeal from the decision of the board of commissioners. The facts set out in the bill of exceptions, considered in connection with other facts disclosed by the record, in our opinion, clearly justify the action of the lower court in dismissing the appeal.

It appears that appellants, on May 26, 1896, a few days after filing their appeal bond, which is said to have been filed on May 19, 1896, instituted an action to enjoin the construction of the pike or road in question, and were successful in being awarded by the Monroe Circuit Court a temporary injunction. This judgment, upon appeal to the Supreme Court, was reversed, and, upon the cause being remanded to the lower court, the latter, on April 23, 1897, decided adversely to appellants. After filing their appeal bond, appellants seem to have delayed taking any steps to perfect their appeal for a period of ten months, as it is disclosed that they did not file a transcript of the proceedings had before the board of commissioners with the clerk of the Monroe Circuit Court until March 17, 1897, during which period they seem to have been prosecuting another action to defeat the construction of the improvement in question. When the fact of the long delay upon the part of appellants in attempting to perfect their appeal—for which delay no excuse is shown—is considered in connection with the other fact that appellants, after filing their appeal bond, instituted an action for injunction to secure the desired relief, we think it is conclusively shown that they had abandoned their appeal to the circuit court from the board's decision, and thereby waived their right to perfect the same by filing a transcript of the proceedings before the board with the clerk of the lower court; and for this reason alone they could have no standing in court to prosecute the appeal, and hence it was properly dismissed.

Again, upon another view of the case, the judgment must be affirmed. The motion to dismiss, as heretofore shown,

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assailed the sufficiency of the affidavit and the appeal bond. The transcript certified by the auditor in no manner sets out or refers to either the appeal bond or affidavit. It is entirely silent in respect to the filing with the auditor of the affidavit and the bond, or in regard to the approval of the latter by that official. In this respect, at least, the transcript of the proceedings before the board was not complete, and the appeal, therefore, was not perfected as the law required. *Shirk v. Moore*, 96 Ind. 199.

It is true that the clerk of the lower court, as stated, has copied into the transcript, prepared by him for this appeal, what purports to be an affidavit; but this latter document is not made a part of the record by any bill of exceptions, nor is there any order of court authorizing the clerk to make it a part of the record. It must follow, therefore, that it, under the circumstances, can not be considered as a part of the record on appeal to this court.

In the absence from the record of the affidavit in controversy, we are not in a position to decide upon its sufficiency, and, as we are required to indulge all presumptions in favor of the ruling of the lower court, we may reasonably assume that the court sustained the motion to dismiss for the reason that the affidavit in support of the appeal was not sufficient. Judgment affirmed.

LIGHTCAP v. THE TOWN OF NORTH JUDSON ET AL.

[No. 18,702. Filed January 11, 1900.]

DEDICATION.—Acceptance.—Highways.—To constitute a dedication of land for highway purposes, there must be an offer of the land by the owner, and acceptance of such offer by the public or by the proper local authorities. *p. 46.*

SAME.—Revocation.—The owner of certain real estate offered to dedicate a part thereof to the public for highway purposes. Before the offer was accepted such owner sold and conveyed the real estate, the deed of conveyance containing no reservation of the part so offered to the public. *Held*, that the conveyance constituted a revocation of the offer to dedicate. *pp. 46, 47.*

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From the Pulaski Circuit Court. *Reversed.*

William Spangler and H. R. Robbins, for appellant.

Burson & Burson and S. Bybee, for appellees.

BAKER, J.—Complaint to enjoin appellees, the town of North Judson and its officers, from interfering with appellant's property. Answer of general denial. Special finding of facts and conclusions of law. Judgment for appellees. The only error assigned is that the court erred in its conclusions of law.

The facts, briefly stated, are as follows: In 1886, one Stephen J. Nave was the owner of a strip of land sixty-six feet wide off of the south side of a triangular parcel of ground in the town of North Judson, the southern boundary of which was an alley sixteen feet in width. In March, 1886, certain citizens living west of this land, desiring more roadway than was afforded by the sixteen foot alley, bought of Nave a strip nine feet wide off of the south side of his land next the alley; and on the 26th of March, 1886, Nave and wife executed their deed for such strip to Wayne township for road purposes, that being the township in which the land and the town of North Judson were situated. After its execution, the deed was delivered to J. E. Jones, a citizen who had been instrumental in raising the money to pay for the strip. Jones was not an officer of the township at the time nor afterwards. The deed was shown to Jacob Kries, the township trustee, who read it and handed it back to Jones. The deed was never formally delivered to the trustee of the township. Afterwards, on July 5, 1893, some person caused the deed to be properly recorded in the records of deeds of Starke county. On October 7, 1886, Nave and wife conveyed to appellant the entire sixty-six foot strip, including the part described in the deed to Wayne township. At the time of the negotiations between Nave and appellant for the sale and purchase of the land, Nave in-

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formed appellant that he had sold and transferred to the township for road purposes a strip nine feet wide off of the south side of his sixty-six foot piece of ground, and went with appellant and by measurement on the premises showed where the north line of the nine foot strip would fall. Appellant acted as scrivener in drawing up the deed, taking the description from an old deed. There was no reservation in the deed of the nine foot strip. Both Nave and wife could read and write, but the deed was not read to them after it was prepared and before they signed it. The deed to the appellant was duly recorded October 11, 1886. After appellant had procured the deed, he placed a fence along the south side of the sixty-six foot strip of land for the purpose of inclosing the ground bought of Nave. The marshal of North Judson took away the fence by direction of the town board, and, in the spring of 1894, the plaintiff having replaced the fence, the marshal again removed the fence. The fence was again rebuilt, and again torn away by the marshal. The town of North Judson was incorporated in 1889, and the land in controversy is within the corporation limits, and the town threatens again to take the fence down, if it is again built. On January 11, 1894, appellant recovered a judgment in the Starke Circuit Court quieting his title to the land in controversy against the county of Starke and Wayne township in Starke county, which is in full force and unappealed from, but the town of North Judson was not a party to the judgment.

From these facts the court concluded that the strip of ground in controversy was a part of the public alley.

It is not found that the grantee in the dedicatory deed ever accepted it, or authorized its acceptance; or that the county or town ever accepted the offer; or that the public or any road officials accepted the proposed dedication by using the strip as a highway; or even that the individuals who raised the money to pay Nave for the land ever used it or claimed the right to use it for a way, public or private.

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Delivery and acceptance are necessary to complete the execution of a deed. *Bremmerman v. Jennings*, 101 Ind. 253; *Rittmaster v. Brisbane*, 19 Col. 371, 35 Pac. 736; *Richardson v. Grays*, 85 Iowa 149, 52 N. W. 10; *Cravens v. Rossiter*, 116 Mo. 338, 22 S. W. 736; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 50 N. E. 963; *Hubbard v. Cox*, 76 Texas 239, 13 S. W. 170. To constitute a dedication by which the public or the appellees herein could acquire any rights over the property, there must be an offer of the land by the owner, for street purposes, and an acceptance of the offer by the public or by the proper local authorities. *City of Columbus v. Dahn*, 36 Ind. 330; *Mansur v. State*, 60 Ind. 357; *Mansur v. Haughey*, 60 Ind. 364; *Pennsylvania Co. v. Plotz*, 125 Ind. 26; *Steinauer v. City of Tell City*, 146 Ind. 490; *City of San Francisco v. Canavan*, 42 Cal. 541; *City of Eureka v. Croghan*, 81 Cal. 524, 22 Pac. 693; *Smith v. City of San Luis Obispo*, 95 Cal. 463, 30 Pac. 591; *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774; *Town of Cambridge v. Cook*, 97 Iowa 599, 66 N. W. 884; *State v. Bradbury*, 40 Me. 154; *Kennedy v. Mayor, etc.*, 65 Md. 514, 9 Atl. 234; *Hemphill v. City of Boston*, 62 Mass. 195; *Hayden v. Stone*, 112 Mass. 346; *Slater v. Gunn*, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268; *Field v. Manchester*, 32 Mich. 279; *Baker v. City of St. Paul*, 8 Minn. 491; *Brinck v. Collier*, 56 Mo. 160; *Landis v. Hamilton*, 77 Mo. 554; *City of St. Louis v. University*, 88 Mo. 155; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. 207; *Baker v. Squire*, 143 Mo. 92, 44 S. W. 792; *City of Omaha v. Hawver*, 49 Neb. 1, 67 N. W. 891; *State v. Underhill*, 144 N. Y. 316, 39 N. E. 333; *State v. Fisher*, 117 N. C. 733, 23 S. E. 158; *Union Co. v. Peckham*, 16 R. I. 64, 12 Atl. 130.

On October 7, 1886, the dedication not having been accepted, Nave had the right to withdraw the offer as against the public. The individuals who procured Nave to make the offer could not compel the grantee or the public

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to accept it. If they have a private right of way, it avails appellees nothing. A conveyance before acceptance is a revocation of the offer to dedicate. *City of Eureka v. Croghan*, 81 Cal. 524, 22 Pac. 693; *Trine v. City of Pueblo*, 21 Col. 102, 39 Pac. 330; *Minneapolis, etc., R. Co. v. Town of Britt*, 105 Iowa 198, 74 N. W. 933. The deed of Nave to appellant was therefore a revocation, unless it was ineffectual to pass to appellant the entire estate in the disputed strip. The deed included the strip. True, it is found that appellant had notice of the prior dedicatory deed and was shown the line; but it was not found, however, that Nave did not inform him that the offer of dedication had not been accepted and that it was his intention to revoke the offer or authorize appellant to do so. The fact that appellant wrote the deed and Nave did not read it, of itself affords no inference that the deed as written did not truly express the intention of the parties.

Judgment reversed, with directions to grant a new trial.

THE NO. 4 FIDELITY BUILDING AND SAVINGS UNION
v. BYRD ET AL.

. [No. 18,705. Filed January 12, 1900.]

APPEAL. — *Transcript.* — *Must Be Authenticated by Seal of Trial Court.* — The transcript of the record of the proceedings in the trial court must be authenticated by the seal of such court, or it will not be considered on appeal.

From the Howard Superior Court. *Appeal dismissed.*

L. J. Kirkpatrick, J. F. Morrison and T. C. McReynolds,
for appellant.

J. F. Elliott, W. C. Overton and B. F. Harness, for
appellees.

MONKS, J. — What purports to be a transcript of the record is not authenticated by the seal of the lower court. It is the imperative requirement of the statute that the seal of the court below must be affixed to the certificate, as well as

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that the clerk shall subscribe his name thereto, to present any question to this court. §§661, 7932 Burns 1894, §§649, 5846 R. S. 1881 and Horner 1897; Ewbank's Manual, §117; 2 Ency. Pl. & Pr. 283, and cases cited; *Watson v. Finch*, 150 Ind. 183; *Conkey v. Conder*, 137 Ind. 441; *Campbell v. State*, 148 Ind. 527; *Reid v. Houston*, 49 Ind. 181, 182, 183; *Brunt v. State*, 36 Ind. 330; *Sandford v. Sinton*, 34 Ind. 539; *East Chicago, etc., R. Co. v. Siwy*, 23 Ind. App. 564; *Hinton v. Brown*, 1 Blackf. 429. In the case last cited the trial court had adopted no seal, and the clerk had affixed his private seal. The court said: "The act of Assembly requires the court to have a seal; but what the seal is, and whether it is intended by them to be temporary or permanent, is immaterial. Their records can only be proved by their seal, and as this paper has no seal it must be rejected."

As was said in *Watson v. Finch*, *supra*: "All appeals in this court are tried by the record. It is the only legitimate evidence to establish the rulings of the trial court upon which alleged errors are based. In the absence of the transcript being authenticated, as required by statute, it cannot be considered or treated as a copy of the original record, and therefore cannot be received or used as evidence to sustain appellant's complaint, and the appeal must fail."

A court speaks by its record, and unless the same is authenticated by the certificate of the clerk and seal of the court, there is no evidence that it is the record of the court. It is the duty of an appellant in an appeal to this court to carefully examine the transcript, and see that the same has been correctly and properly prepared and certified, and attested by the seal of the court, before the same is filed. §§661, 7932 Burns 1894, §§649, 5846 R. S. 1881 and Horner 1897; *Miller v. Evansville, etc., R. Co.*, 143 Ind. 570, 573; *Drake v. State*, 145 Ind. 210, 219; *Watson v. Finch*, *supra*; Elliott's App. Proc. §208; Ewbank's Manual §117; 2 Ency. Pl. & Pr. 292-293.

The appeal is therefore dismissed.

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LINGENFELTER v. BALTIMORE AND OHIO SOUTHWESTERN
RAILWAY COMPANY.

[No. 18,764. Filed January 28, 1900.]

RAILROADS.—*Liability for Injury of Licensee*.—A mere licensee injured in the dark by falling into a pit while crossing certain premises of a railroad company cannot recover damages of such company, unless the injury is shown to be wilful on the part of the company.

From the Clark Circuit Court. *Affirmed*.

G. H. Voigt, for appellant.

C. L. Jewett and H. E. Jewett, for appellee.

JORDAN, J.—Appellant filed his complaint in the lower court to recover damages for injuries sustained by falling into a pit situated upon the premises of appellee. A demurrer was sustained to the complaint, and judgment was rendered against the appellant for cost.

The only question presented is: Are the facts, as stated in the complaint, sufficient to entitle appellee to a recovery? It appears, from the facts averred therein, that the defendant is a railroad company, and, at the time plaintiff sustained his injury, owned and operated a railroad in this State, a part of said road being located in the city of Jeffersonville. The defendant's station and yards in said city were located on real estate abutting on Broadway, and extended from First to Fourth streets. The defendant also owned certain grounds which were situated between Third and Fourth streets in said city, and east of and adjoining Broadway. For ten years, and over, prior to the accident in question, these premises of the defendant were unclosed, and a certain pathway leading across them, from a point on Third street to Broadway, had been uninterruptedly used by the public in passing from Third street to Broadway, with the knowledge and permission of defendant railroad company.

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168	341

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The complaint then charges that at and for some time prior to the accident the defendant negligently maintained on its said premises, under its railroad tracks, a certain pit, the dimensions thereof being twenty feet long, four feet wide, and six feet deep, the north end of this pit being within two feet of the south side of the pathway. It is further averred that during all of said time the defendant negligently suffered this pit to remain without cover or guard, and failed to place any signals of danger at or near the same; that, on the day of the accident, the defendant, it is alleged, negligently caused a car to be placed and remain on its railroad track in "proximity of said pit, and in such a position that the south end of the car stood across said pathway to within a foot of the north line of the pit."

The complaint then alleges the facts relative to the accident in question to be as follows: "That on the 12th day of December, 1896, in the night-time, the plaintiff was, in a careful and prudent manner, passing and traveling along said pathway from Third street, in a westwardly direction, and, while so traveling on said pathway, he came to said car then and there standing, as aforesaid, and saw it standing before him, but did not, and by reason of the darkness could not, see that it was standing across said pathway, and did not know that it was standing across the same, but believed from the position of said car that said pathway lay immediately beyond and south of said car; and, in order to pass said car in his travel, as aforesaid, plaintiff was compelled to and did slightly diverge in his course from said pathway, and attempted to pass immediately south of said car, and in so doing he walked and fell into said pit. That, if said car had not been standing across said pathway as aforesaid, said plaintiff would not have diverged from said pathway, and would have safely passed along the same; that if any signal of danger had been placed at or near said pit, or if he had been warned in any way of the dangerous condition of the same, he would not have fallen into it; that at

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the time he so fell into said pit he did not and could not see the same, and had no knowledge of its existence.”

The complaint also states the character of the injuries which appellant sustained by reason of the accident, and alleges his freedom from contributory negligence.

It is evident, we think, when tested by the well settled rules of law applicable to the facts in this case, that the complaint is not sufficient. The gravamen of the pleading appears to be that appellee, for a long time prior to the accident, had suffered or permitted the public to use a path leading across its premises in question as a short cut from one public street to another. For some time before appellant was injured, appellee maintained, under its tracks over said premises, the pit in controversy, and had neglected to cover the same or place any signals of danger near it, in order to warn persons using the path of its presence. On the day preceding the night in which appellant received his injury, it further appears that appellee placed and left standing one of its cars upon its tracks across this path, and thereby obstructed the passage over the same. Appellant, on the night in question, while passing from Third street over appellee's said premises by way of this path, saw the car standing before him, but by reason of the darkness he became confused in regard to the position of the car, and, endeavoring to pass around it, he walked or fell into the pit, and was injured. It is charged that if it had not been for the car standing in the position which it did, he could have passed safely along the path, or, if he had been warned of the danger of the pit, the accident in question would have been avoided.

We may reasonably assume, as there is nothing shown to the contrary, that this pit was constructed and used by appellee for a necessary and legitimate purpose connected with the business in which it was engaged. For the same reason we may also presume that the car in question was necessarily placed and left standing by appellee on its tracks in

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connection with its business. Under this condition of appellee's premises, as stated in the complaint, appellant undertook to cross them by the way of this path, and, in his attempt to pass south of the car, he fell into the pit and was injured. He is not shown to have been upon the premises in controversy in respect to or by reason of any business which he had to transact with the railroad company. There is certainly nothing to disclose that he was upon the company's grounds by reason of any invitation or inducement from it, either express or implied. In the absence of anything to the contrary, we may reasonably assume that he was simply exercising the privilege of using this short cut pathway for his own accommodation or convenience. Upon no view of the case can he be considered as anything more than a mere licensee, and his case falls within the general rule applicable to such persons. The fact that he was passively permitted or suffered by appellee, along with others of the public, to pass over its grounds for his own convenience, may be accepted as showing that he, at the time of the accident, was not a trespasser; but certainly such fact alone can not be regarded as sufficient to show that he was upon appellee's premises by its inducement or invitation, express or implied.

The decisions of this court fully affirm and support the rule that where a person goes upon the premises or lands of another, without any inducement or invitation being held out to him by the owner or occupant, he accepts the use of the premises subject to all dangers incurred thereby in their use or enjoyment; or, in other words, the law, as a general rule, does not cast the duty upon such owner or occupant, under such circumstances, to exercise care over the licensee, or to see that he does not incur danger; but he must accept his permission to go upon the premises with all of the concomitant conditions and perils of such premises, and as a general rule he can not recover for injuries caused by obstructions or pitfalls thereon. Of course, this rule is subject to the exception that the licensor must not wilfully or wantonly cause the injury to the licensee.

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It is not necessary for us to affirm, neither do we mean to hold, that under no circumstances will the owner or occupant of the premises be held liable to the licensee for damages sustained by the latter by reason of pitfalls or traps placed upon the premises. We simply affirm the general rule which is applicable and must control under the facts in the case at bar. In support of the proposition which we have asserted, see *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323, 41 Am. Rep. 572; *Evansville, etc., R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783, and cases cited; *Indiana, etc., R. Co. v. Barnhart*, 115 Ind. 399, and cases cited; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 370; *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. 463; 3 Elliott on Railroads, §§1248, 1249, and 1250.

Appellee, under the circumstances in this case, as the authorities affirm, owed no duty to appellant to refrain from obstructing the path by placing the car, as it did, upon its tracks situated on its own grounds, which were used in connection with the particular business in which it was engaged. Neither did the duty rest upon it, under the circumstances, to place signals of danger at or near the pit in order that a mere licensee, like appellant, passing over these grounds in the night-time, might be warned, and thereby avoid falling into such pit.

As said by Holmes, J., in *Reardon v. Thompson*, 149 Mass. 267, on p. 268: "An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril."

The case of *Redigan v. Boston, etc., R. Co.*, 155 Mass. 44, 14 L. R. A. 276, is very similar to the case at bar. In the Redigan case, the station grounds of the railroad company were permitted to be used by foot passengers, and others of the public, not having any business with the company, in passing over the same as a short cut from one public street to another. The plaintiff in that case, in the night-time, while passing along over the defendant's grounds

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by way of the short cut, was injured by falling into an unguarded hole or opening. It was held, under the facts in that case, that the plaintiff was a mere licensee, and the railroad company was not liable for the damages sustained.

We conclude that the judgment of the lower court ought to be affirmed, and it is so ordered.

CAPITAL NATIONAL BANK OF SALEM ET AL. v. REID,
ADMINISTRATOR, ET AL.

[No. 18,830. Filed January 23, 1900.]

APPEAL AND ERROR.—*Parties.*—Parties to a judgment whose interests are adverse to that of one appealing from such judgment must be made parties to the appeal. *p. 56.*

SAME.—*Record.*—*Agreement.*—An agreement in open court that "all matters material in evidence might be proved under the general denial to the pleadings filed, the same as if specially pleaded by cross-complaint, answer, or reply," did not withdraw the cross-complaints filed when the agreement was made, and in the absence of such pleadings from the record, upon which questions raised by the assignment of errors depend, no question is presented. *pp. 56, 57.*

From the Washington Circuit Court. *Appeal dismissed.*

F. M. Hostetter and *S. H. Mitchell*, for appellants.

J. A. Zaring, *M. B. Hottel*, *Harvey Morris*, *D. M. Alsbaugh* and *J. C. Lawler*, for appellees.

MONKS, J.—Appellee, Volney T. Reid, as administrator with the will annexed of the estate of James F. Burcham, deceased, filed his petition in the court below to set off to the widow her undivided one-third of the real estate of said testator, and to sell the part not set off to her to pay the debts of said estate, making defendants thereto the widow and children of said deceased. John H. Albert, and William A. Cusick held a mortgage on said real estate, and the Capital National Bank of Salem and John F. Burcham each held a mortgage on said real estate. The wife of said deceased did not join in the execution of either of

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said mortgages. The mortgage to Burcham was to indemnify him against any loss as the surety of said deceased to divers persons. These mortgagees were all made defendants to said petition. By agreement of parties the undivided one-third of said real estate was set off to the widow in the manner provided by law. Afterwards, appellants, John H. Albert and William A. Cusick, filed an answer to said petition to sell, and also a cross-complaint in three paragraphs against all the other parties to said action. The Capital National Bank of Salem filed an answer to said petition, and also a cross-complaint in three paragraphs against all the other parties to said action. John F. Burcham filed an answer to the petition of the administrator, and also an answer to the cross-complaint of Albert and Cusick, and an answer to the cross-complaint of said National Bank. Belle L. Burcham filed an answer to the petition and the several cross-complaints in said cause. Albert and Cusick and said National Bank, respectively, filed answers to the cross-complaints to which they were made defendants. Afterwards, Albert and Cusick and the Capital National Bank, by permission of the court, amended their respective cross-complaints by making new parties defendant thereto. Afterwards said new parties defendant to said cross-complaints, John R. Bare, Clare E. Bressie, James H. Spaulding, Bank of Salem, James Wilson, and Raymond Duff, were duly served with process. The parties agreed in open court that all matters material in evidence might be proved upon the trial under the general denial to the pleadings filed, the same as if specially pleaded by cross-complaint, answer, or reply. The court, at the request of one of the parties, made a special finding of facts, and stated conclusions of law thereon, to which appellants severally excepted. The court ordered that the real estate not set off to the widow be sold, and the proceeds applied, first, to the payment of the \$500 allowed the widow by law, next to the indebtedness of the testator for which said John F. Burcham was surety, and

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on account of which the indemnifying mortgage was executed to him, and the remainder, if any, be applied to the payment of the indebtedness to Albert and Cusick and said National Bank secured by their respective mortgages. The Capital National Bank of Salem, John H. Albert, and William S. Cusick alone appeal. They assign errors, making Volney T. Reid, administrator, and Belle F. Burcham, the widow, and John F. Burcham appellees.

Appellees have filed a motion to dismiss the appeal on the ground that appellants have not made all the parties whose interests are adverse to and in conflict with theirs appellees in this court. It appears from the record that the mortgage executed by the decedent to John F. Burcham was to indemnify and secure him against loss as the surety of said deceased on notes held by the following parties: Salem Bank, John R. Bare, Martha Bressie, James Wilson, Raymond Duff, and James H. Spaulding. These persons were by leave of court made defendants to the cross-complaints filed by appellants, and duly brought into court by the service of summons. The final judgment expressly ordered that the administrator pay, not to John F. Burcham, the surety, the amount for which he was surety, but to the Salem Bank, John Bare, Mrs. Bressie, James Wilson, Raymond Duff, and James H. Spaulding, the amount of the claim held by each respectively, upon which said John F. Burcham was surety, and, if any of said claims be paid by said Burcham as surety, the administrator pay the amount thereof to him. It is evident that the holders of said notes above named, being parties to the action in the court below, were opposite parties to appellants, the same as Belle Burcham and John F. Burcham, and should have been made co-appellees with them, under the rule declared in *McClure v. Shelburn Coal Co.*, 147 Ind. 119, and *Garside v. Wolf*, 135 Ind. 42. Upon the authority of the cases mentioned, the motion to dismiss the appeal is sustained.

Moreover, if all opposite parties to appellants had been made appellees in this court, the judgment would be af-

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firmed, because the questions raised by the assignment of errors could not be determined on account of the absence from the record of the cross-complaints filed by appellants in the court below: The agreement in open court that "all matters material in evidence might be proved under the general denial to the pleadings filed, the same as if specially pleaded by cross-complaint, answer, or reply," did not withdraw appellants' cross-complaints, as insisted by them. Said cross-complaints were "pleadings filed" when said agreement was made, and were a part of the record in the court below. By virtue of said agreement all defenses to the petition and cross-complaints could have been made under general denials filed thereto, the same as if specially pleaded. The law imposes upon an appellant the duty of presenting a record disclosing manifest error before he is entitled to a reversal. In the absence of the pleadings upon which the questions raised by the assignment of errors depend, no question is presented. *Marsh v. Bower*, 151 Ind. 356, 357. Whether or not the court should have found that appellants' mortgages are prior or subsequent to the mortgage of Burcham depends upon the allegations of said cross-complaints as well as upon the evidence, and not on the allegations of the petition, which presents no question of priority of liens. For all that appears from the record, said cross-complaints may admit that the lien of the mortgage held by Burcham is prior to the lien of the mortgage held by the appellants. In the absence of said cross-complaints, we must indulge in this presumption, if necessary, to sustain the special finding, conclusions of law, and judgment of the trial court. What was said in *Marsh v. Bower*, *supra*, concerning the absence from the record of the complaint, applies in this case with equal force to the cross-complaints of appellants. The court said: "The sufficiency of pleadings, the correctness of conclusions of law, and questions upon the motion for a new trial, all relate back to the complaint, and, in its absence from the record are not properly presented." Appeal dismissed.

City of Goshen v. Alford.

THE CITY OF GOSHEN v. ALFORD.

[No. 18,689. Filed Oct. 26, 1899. Rehearing denied Jan. 28, 1900.]

NEGLIGENCE.—Personal Injuries.—Complaint.—Municipal Corporations.—A complaint in an action against a city for personal injuries which alleges that defendant by its servants and agents made an excavation in a public street and left it uncovered and unguarded, and that plaintiff while traveling over the street, exercising due care, and having no knowledge of the existence of the excavation, fell into the same, and was injured, states a cause of action. *pp. 59, 60.*

SPECIAL VERDICT.—Judgment.—Personal Injuries.—Municipal Corporations.—A special verdict in an action against a city for personal injuries found that the city by its workmen and agents removed certain wooden hitching-posts along the line of a public street, and left a hole from two to four feet deep, and one foot wide, with perpendicular walls, unguarded, in front of the store in which plaintiff was employed; that plaintiff while walking from the store to the street, after dark, for the purpose of entering a carriage to go home, not knowing of the existence of the hole, stepped into it, and was injured. *Held*, that judgment was properly rendered in favor of plaintiff on the special verdict. *pp. 60-62.*

MUNICIPAL CORPORATIONS.—Defective Streets.—When City Bound by Acts of City Marshal.—Where in an action against a city for a personal injury caused by a hole left in a public street by the removal of a hitching-post by men employed by the city marshal, evidence that the city paid the men employed by the marshal for doing the work raises the presumption that the work was authorized by the city, and is sufficient to bind the city for injury resulting from the negligent manner in which the work was done. *pp. 63-66.*

APPEAL AND ERROR.—Excessive Damages.—A judgment against a city for personal injuries will not be reversed as excessive, where it cannot be said that the amount awarded indicated that the minds of the jurors were influenced by improper motives or feelings, or that they overestimated the amount necessary to compensate plaintiff for the injury he sustained. *pp. 66, 67.*

From the Elkhart Circuit Court. *Affirmed.*

E. E. Mummert, W. J. Davis, W. H. Charnley, A. S. Zook, C. C. Black and W. L. Stonex, for appellant.

E. A. Dausman, F. E. Baker and C. W. Miller, for appellee.

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DOWLING, J.—This is an action for a personal injury alleged to have been sustained by the appellee by reason of the culpable negligence of the appellant in creating a nuisance on one of its streets. A demurrer to the complaint was overruled, and an answer in denial was filed. On motion of the appellant, the jury were directed to return a special verdict. Appellant's motions for judgment in its favor on the special verdict, and for a new trial were overruled. At the suggestion of the court, a *remittitur* of a portion of the damages awarded the appellee was entered of record by him, and judgment was rendered in his favor for the residue. Exceptions to the several rulings of the court were properly saved.

The errors assigned are, the decision of the court overruling the demurrer to the complaint, its refusal to render judgment for the appellant on the special verdict, and its denial of a new trial.

The complaint stated, in substance, that on the 7th day of November, 1895, the city of Goshen, by its servants and agents, opened and excavated a hole on the line of Washington street, at a point between Main and Fifth streets in said city, said Washington street being then and there one of the public streets of and in said city, and negligently left the same open, uncovered, and unguarded; that, in the nighttime, and while the plaintiff was traveling on, over, and upon said street, exercising due care, and having no knowledge of the existence of said pit and hole, without fault on his part, he fell into the same, thereby injuring himself, etc.

It was the duty of the appellant, the city of Goshen, to keep its streets in a reasonably safe condition for the use of the public by night as well as by day. If it disregarded this obligation, and by its servants or agents created a dangerous nuisance on one of its streets, and if, in consequence of such neglect, a person lawfully upon such street, exercising proper care, who had no knowledge of the existence of such nuisance, and who was himself free from fault, was

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injured thereby, the city was liable. It appears from the averments of the complaint that the appellant did, by its agents and servants, create such a nuisance; that the appellee was ignorant of its existence; that he was exercising due care; that he was injured by the wrongful act of the city in leaving open and unguarded in the night-time a deep pit on one of its public streets, and that the appellee sustained such injury without fault on his part.

The statutes of this State gave to the common council of the city of Goshen control over the streets and alleys of that city, and whether it had the right to erect iron hitching-posts near the edge of the sidewalk or not, it certainly had the right to remove hitching-posts already there, if they had become obstructions to travel, or were rotten, unsightly, or unsafe. The charge in the complaint is that the city removed the wooden post and left the pit exposed. This averment rendered an allegation of notice to the city of the existence of the nuisance unnecessary. It was bound to take cognizance of a nuisance created by itself. The allegations of the complaint, that the appellee had no knowledge of the existence of the excavation or hole in the edge of the sidewalk, are not inconsistent with the other matters stated, and it cannot fairly be inferred from anything in the pleading that the appellee knew that the hole was there, or that it had been left in such a condition as to render the street unsafe.

There was here, to use the language of Lord Ellenborough, in *Butterfield v. Forrester*, 11 East 60, "An obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

In our opinion, the complaint was sufficient, and the demurrer to it was properly overruled.

In the next place, the appellant complains of the refusal of the court to render judgment in its favor upon the special verdict. Every fact essential to the recovery of the appellee is found by the special verdict, and none of the facts

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found is inconsistent with his right so to recover. Some of the facts found are, perhaps, evidentiary only, or are mere conclusions of law; but, disregarding every objectionable answer in the verdict, amply enough remains as we think to entitle the appellee to judgment.

The following is a summary of the facts so found: On and before November 7, 1895, the city of Goshen erected and maintained a line of wooden hitching-posts along the south side of Washington street, one of the public streets of that city; on said day said city, by its workmen and agents, proceeded to remove said posts, and to substitute iron posts in their stead; one of said wooden posts, which stood in front of a grocery store building occupied by one Hoffman, was so removed, and a hole from two to four feet deep, and one foot wide, with perpendicular sides, was left where the post had stood; on the evening of said day, the city of Goshen, by its workmen and agents, abandoned said work, leaving the said pit open, and without any barrier or signal of danger near it; said city also left at the same place some large stones surrounding said hole, and without barrier or danger signal; on said day, appellee was at work in said Hoffman's store as a salesman, and, at about 6 o'clock in the evening of said day, he walked from the store to the street in front thereof for the purpose of entering a carriage to be driven to his home; at that time it was dark, and drizzling rain; the sidewalk was about fifteen feet in width, and the hole, or pit, was within a few inches of its outer edge, and from five to ten inches below the top of the same; the appellee did not know of the existence of the said hole or pit, or of the stones surrounding it, or of any danger in that vicinity; appellee left said store and walked out to the street to enter the buggy, as a reasonably prudent man, under similar circumstances, would have done; he stepped into the hole with his right foot, and was thrown violently to the ground; in his fall appellee ruptured certain ligaments of his knee, dislocated and fractured his knee-cap, and sus-

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tained other severe injuries external and internal; the place on said street, where appellee attempted to enter said carriage, was a proper one for the use of the public; the appellant was negligent in leaving the hole unguarded, and the pile of stones near to the same; appellee did not in any manner contribute to his injuries; he was making from \$8 to \$10 per week, and was a competent salesman; he has not been able to earn anything since he was injured, and his injuries are of a permanent character and will cause him great pain for the rest of his life; appellee expended \$195 for medical attendance and services; on the day of the accident he knew that the old wooden posts were being taken out, and that iron posts were being put up in front of Hoffman's store; at the time of the accident there was no light from public lamps at the place where appellee was injured; he could not have seen the hole if he had looked for it; lamps were burning in Hoffman's store when the accident occurred, but the place where appellee was injured was not so lighted that a person using ordinary care and caution could have seen the hole and the stones; the work of erecting the hitching-posts was authorized and done by the order of the city council; the city marshal had knowledge of the hole before the accident occurred.

It will be seen that the special verdict finds that the work was done by the authority and order of the common council, so that, upon the consideration of the verdict, there can be no doubt as to the responsibility of the city for the existence of the hole in the street. Upon the facts so found, the court could not do otherwise than overrule appellant's motion, and render a judgment for appellee.

The last error assigned is the refusal of the court to grant a new trial. Questions as to the admissibility and competency of evidence are discussed by counsel for appellant, but upon a careful examination of the testimony so admitted and excluded we are of the opinion that the rulings of the court were correct. Neither can we discover any material

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variance between the allegations of the complaint, touching the character and extent of the injuries sustained by the appellee, and the proof of the same.

Another of the grounds of the motion for a new trial is that the verdict is not sustained by sufficient evidence, and is contrary to law. The only question of real difficulty in this case arises upon the evidence as to the connection of the city with the nuisance causing the injury. The complaint directly charges, and the special verdict expressly finds, that the work of removing the wooden post, and leaving the dangerous hole or excavation in the street, were the acts of the appellant, the city of Goshen. The evidence given on this point was as follows: "Q. 1. You may state your name? A. John E. Rigney. Q. 2. What is your business? A. City marshal. Q. 3. How long have you been city marshal? A. A year and nine months. Q. 4. City marshal of what city? A. Goshen, Elkhart county. Q. 5. You was city marshal on the 7th day of November, 1895? A. Yes, sir. Q. 6. State what, if anything, you did with reference to removing, or causing to be removed, a line of wooden posts, hitching-posts, along the south side of Washington street in the city of Goshen? A. On the 7th day of November? Q. 7. Yes, sir, on the 7th day of November, 1895? A. Well, there was an old line of hitching-posts, or hitching-rack, that was partly broken down, and the posts, two of them, at the west end, had rotted off, and fell into the gutter, and they had laid that way quite awhile, so, I was talking with Wilhide and Neidig, and told them we had some iron hitching-posts, and asked them if it wouldn't be a good idea to put them in there. Q. 8. Who is Wilhide and Neidig? A. City councilmen. Q. 9. Of the city of Goshen? A. Yes, sir. Q. 10. Was Wilhide on the committee of streets, and alleys, and sidewalks? A. That I couldn't say. Q. 11. Well, you consulted with Wilhide and Neidig with reference to this matter? A. Yes, sir. Q. 12. And then what did you do with reference to

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removing these old wood posts, did you cause them to be removed? A. Yes, sir. Q. 13. Did you employ men for that purpose? A. Yes, Jacob Ogle and William Brown. Q. 14. Did you go round there, yourself, to see whether this work was being done? A. Yes, sir. Q. 15. Do you know that the work was done by these men that you employed? A. Yes, sir. Q. 16. For whom did you employ these men? A. I didn't say at the time who employed them. I just told them. Q. 17. They weren't working for you personally? A. Working for me? Q. 18. As marshal of the city? A. Yes, sir. Q. 19. They were working for the city? A. That is where they got their pay. Q. 20. After they did this work, you made out a bill for their labor? A. Yes, sir. Q. 21. And OK'd the bill as marshal of the city? A. Yes, sir. Q. 22. And the bill was paid by the city? A. Yes, sir."

If there was no evidence here except that the city marshal caused the work to be done, and the post to be removed, after consultation with two members of the city council, we would feel compelled to decide that the city was not responsible for the unauthorized act of the marshal. It is said in *Cook v. City of Anamosa*, 66 Iowa 427, 23 N. W. 907: "There was evidence tending to show that the city marshal was informed, a few days before the accident, of the defect in the walk, but no steps were taken by the city to repair the walk until after the injury occurred. * * *

"The marshal was not charged either by statute or ordinance with any duty with reference to the inspection or repair of streets or sidewalks. By an ordinance of the city it was made the duty of the street committee to examine the sidewalks and they were empowered to order that any sidewalk be repaired by the property owner on whose property it abutted, and they had authority to direct the marshal to notify the property owners to make the repairs which they ordered. But he was not charged with any duty or clothed with any power, either to make repairs or determine that

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any should be made. He was simply a peace officer, having power to make arrests, and to serve such writs and execute such processes as should be directed to him. * * * The city would undoubtedly have been affected by any notice of the defect given to its mayor, for he is its executive officer, and is clothed with general executive powers. It would likewise have been affected by notice to its council, for that body is charged with the duty of making provision for the repairs and improvements of its streets and walks; and, as the duty to inspect the sidewalks and order their repair was specially imposed upon the street committee, the city would doubtless have been affected with any notice of the defect, which had been given to that committee, or the individual members of it. But we think the circuit court correctly held that it was not affected by the notice given to the marshal.

“That officer, as we have seen, was charged with no duty with reference to the matter. He was not required, in the discharge of any of his official duties, to repair the defect; nor had he any power to order such repair to be made by any other person; nor was he required, in the discharge of any official duty, to communicate to the mayor, or council, or street committee, the information which he had received concerning the defect. It cannot be said, then, that he was negligent in not communicating it, nor can the city be charged with negligence because of his failure to take any action with reference to it.”

But the question here is not one of notice to the city, through its marshal or members of its common council, but whether the removal of the post and the leaving open the hole and excavation were the acts of the city, or of its agents, for whose torts it is responsible.

The general statute for the incorporation of cities makes the marshal the chief ministerial officer of the corporation. §3510 Burns 1894, §3075 R. S. 1881 and Horner 1897.

If required to do so by the common council, or by the

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mayor, or committee on streets, properly authorized thereunto, it would become his duty to remove an obstruction from a street, and such obstruction might consist of a hitching-post, or a decayed hitching-rack. In this case, the marshal did perform a ministerial act on the part of the city, and did it in such a negligent manner that a nuisance was created, resulting in an injury to the appellee. The bill of expenses for the work was made out and approved by the marshal, was presented to the proper city authority, and was paid by the city.

Under these circumstances, we must presume that the act of the marshal, in employing laborers and directing them to remove the posts, was authorized by the common council, or by its committee on streets, and, therefore, that the city became responsible for the injury resulting from the negligent manner in which the work was done. The fact that the men employed by the marshal were paid by the city for doing the work was neither denied nor explained. If the marshal had been acting without authority, it is not at all probable that the city would have paid a bill incurred by him without the knowledge of the mayor, or common council, or street committee. We cannot escape the conclusion that the payment of the bill for this work by the city implied the previous authorization of the marshal to employ the laborers, and to cause the work to be done. In our opinion, the evidence is sufficient to sustain the verdict.

The last point made on behalf of the appellant is, that the damages are excessive. While the amount assessed was large, it must be borne in mind that the injuries of the appellee were very serious, and were shown to be permanent in their character. The jury found by their special verdict that the appellee was disabled from performing manual labor, and that he would suffer great physical pain the remainder of his life. We cannot say that the amount allowed him indicates that the minds of the jurors were influenced by improper motives or feelings, or that it is evident that

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they overestimated the amount necessary to compensate the appellee for the injury he sustained.

We are of the opinion that the court did not err in requiring the appellee to enter a *remittitur* of a portion of the damages assessed by the jury, and, upon such entry being made, overruling the motion for a new trial. It is said that *remittiturs* are favored by the courts. *Howard v. Grover*, 28 Me. 97. The practice has been recognized by the courts as a proper one from an early day. *Cro. Car.* 192; 16 Am. & Eng. Ency. of Law, p. 593, note 2. And a new trial may be refused in actions *ex delicto*, if the plaintiff remits damages to such an amount as the court deems proper. *Idem* p. 593, note 4, and cases cited.

Finding no error in the record the judgment is affirmed. Baker, J., was absent.

STEVENS ET AL. v. LEONARD, EXECUTOR, ET AL.

[No. 18,756. Filed January 24, 1900.]

NEW TRIAL.—*Verdict Not Sustained by Sufficient Evidence*—That “the verdict is not sustained by sufficient evidence” is the proper and statutory cause for which a new trial may be demanded, and it is not necessary, in addition thereto separately to assign that “the verdict is contrary to the evidence.” p. 69.

APPEAL.—*Evidence.*—*Weight Of.*—The Supreme Court will not review the evidence, where there was competent evidence to sustain the verdict. pp. 70, 71.

WILLS.—*Testamentary Capacity.*—The fact that the testator was, at the time of making his will, suffering great pain, did not take away his testamentary capacity. p. 71.

SAME.—*Undue Influence.*—*Trial.*—*Instruction.*—The complaint, in a suit to contest a will, charged that such will was invalid upon the ground of the unsoundness of mind of testator, and also for undue influence in the execution thereof. Upon the trial there was no evidence that the execution of the will was procured by undue influence. *Held*, that it was not error for the court by proper instruction to withdraw from the jury the question of undue influence. p. 71

154	67
154	246
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161	69
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WILLS.—Undue Influence.—The fact that some of the relatives ignored by a testator in his will were poor is of itself of little weight in determining whether undue influence was exercised over the testator. *p. 75.*

SAME.—Subscribing Witness.—Instruction.—An instruction that "a person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind, and while the law will subsequently permit him to testify to the contrary, because the truth, if such it be, should be learned, yet the jury trying the case may consider the fact of such implied contradiction in weighing his testimony," is a correct statement of the law, and is not an invasion of the province of the jury. *pp. 76-79.*

SAME.—Undue Influence.—Evidence.—Where, on the trial of an action to contest a will, it was contended by plaintiff that the testator's antipathy for his brother was without substantial foundation, but was due to an insane delusion, it was proper to admit evidence in contradiction thereof showing that such brother had stated to a crowd that testator in his lifetime had improved every opportunity to take advantage of his brothers, and had robbed them, although it was not shown that testator had knowledge of such statement before making his will. *pp. 80, 81.*

EVIDENCE.—Expert Testimony.—Unsoundness of Mind.—On the trial of an action to contest a will, on the ground that the testator was a person of unsound mind, a physician shown to possess the necessary qualifications of an expert, was asked the question whether or not from his conversation with and examination of testator at a time specified, such testator "was laboring under an insane delusion or anything of that kind." To which question the witness answered in the negative. *Held*, that the answer was not objectionable as being a statement of fact, and not the expression of an opinion. *p. 82.*

TRIAL.—Misconduct of Juror.—Appeal.—Where the question of alleged misconduct of a juror was tried in the court below upon affidavits and counter affidavits, it will be presumed on appeal that the decision of the trial court was correct. *p. 82.*

From the Lake Circuit Court. *Affirmed.*

N. L. Agnew, D. E. Kelly, E. D. Crumpacker and J. B. Peterson, for appellants.

A. C. Harris, A. D. Bartholomew, J. W. Youche, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellees.

DOWLING, J.—Joseph Leonard died June 5, 1895, leaving no wife or child. His heirs at law were his three

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brothers, James, Alvah, and John, and the children of a deceased sister, to wit, Lewis W. Stevens, William Stevens, Clara DeMotte, Eva Finney and Elizabeth Finney. On the 1st day of June, 1895, a paper purporting to be the last will of the said Joseph Leonard, bearing date of December 13, 1888, was presented to, and admitted to probate in, the Porter Circuit Court, of Porter county, Indiana, which was then in session. Afterwards, on the 25th day of March, 1896, the appellants filed their complaint to contest the said will, alleging unsoundness of the mind of the said Joseph Leonard, and the undue execution of the will. There was a further allegation that a subsequent will had been executed by the said Joseph Leonard revoking the former will, but this ground was abandoned by the contestors and requires no further notice. The statutory requirements as to the verification of the complaint, and the execution of an undertaking for costs were complied with. The appellees appeared and answered. After the commencement of the action, John Leonard, one of the brothers, died, and John Brodie, as the administrator of his estate, together with the widow and children of the said John Leonard were by a supplemental complaint, made defendants in the place of the said John. On the application of the appellants, the venue of the cause was changed to Lake county, the case was tried by a jury, and a general verdict was returned sustaining the will. A motion for a new trial was overruled, and the court rendered judgment on the verdict. The only error assigned is the overruling of the motion for a new trial.

The first cause for which a new trial was claimed was that the verdict was contrary to the evidence; and the second, that the verdict was not sustained by sufficient evidence. The latter is the proper and statutory cause for which a new trial may be demanded, and, when stated, it is not necessary to allege that the verdict is contrary to the evidence. A verdict which is contrary to the evidence is correctly de-

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scribed in the motion for a new trial in the language of the statute, as not sustained by sufficient evidence.

The first proposition in the argument for the appellants is that Joseph Leonard made his will under a delusion concerning the character and conduct of his brother Alvah. The complaint and answer made the question of the soundness or unsoundness of the mind of Joseph Leonard, at the time of the execution of the will, an issue in the cause. Hundreds of pages of evidence in the record exhibit the conflicting facts and opinions of the witnesses called to support, and to combat, the averment of mental infirmity. The question tried and determined by the jury was not whether Alvah Leonard was a rogue, a hypocrite, and a cheat, nor whether the aversion manifested by Joseph Leonard toward his sister's children was justifiable, or well or ill-founded, but whether Joseph was of sound mind when he executed his will. To maintain the issue on the part of appellants, the manifestation of bitter and unnatural sentiments by Joseph Leonard against his brother Alvah was shown, and there was evidence of expressions of unkind feeling toward his sister's children. But this proof was met by testimony, that these sentiments and feelings were not the result of insane delusions, but that they had their origin in real grievances, and apparent slights. The existence of intense and implacable resentments is not incompatible with entire soundness of understanding; and trivial instances of disrespect may create aversion and dislike in a mind which is either sensitive or exacting and imperious. All these facts were before the jury, and, after long deliberation, they arrived at the conclusion that Joseph Leonard was not of unsound mind when he made his will. In our opinion, the evidence entirely fails to show that the feelings of Joseph Leonard toward his brother Alvah, and the children of his deceased sister, were the result of insane delusions or hallucinations. The deceased was evidently a man of coarse but vigorous mind, of strong will, illiterate, and unrefined. His prejudices were

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violent, perhaps unjust and excessive, but we find no support in the evidence for the allegation of the complaint that his mind was unsound, and that he was incapable of disposing of his estate by will. It is not within the province of this court to weigh the evidence, and even where the preponderance against the finding or verdict is apparent and great, we cannot, under the oft repeated rule of decision by which we are governed, disturb the conclusions of the court or jury. The circumstance that the supposed testator was, at the time of the execution of the will, suffering from acute pain, did not take away his testamentary capacity. *Torrey v. Blair*, 75 Me. 548. The evidence, in our opinion, fully sustains the verdict, and the court did not err in refusing to grant a new trial on account of the alleged insufficiency of the proof.

The appellants next complain that the court erred in giving instruction numbered one, which was in these words: "There is no evidence to show that the testamentary instrument in question was not, in the matter of forms gone through with, in all respects duly executed. I do not withdraw from your consideration, if you deem it important, any proof as to the extraneous influences, if any, which operated on the mind of the testator, if they did so operate, but, upon the condition of the evidence in this case, I instruct you that such influences, if any, can only be considered upon the question as to whether the testator was of unsound mind. There is, therefore, but one ultimate question for your consideration under the facts in this case, and that is, was the testator at the time he signed the testamentary disposition of his property, now in contest, so far of unsound mind as to invalidate the document which has been probated as his will?"

Counsel say in their brief: "Of course, it is at once to be perceived that this instruction takes out of the record, as it is intended to do, the question of undue influence. This was a question upon which the appellants relied, and now

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insist that the court erred in withdrawing the question from the jury. The same question is presented in instruction number ten, asked for by the appellants (page sixty-one of the record) which is as follows: 'If you believe from the evidence that at the time of making the will in question, and for several years prior thereto, Joseph Leonard was in poor health, and in a condition of nervousness and excitability, and if you further believe that during that time James Leonard, one of the defendants, took advantage of his enfeebled condition, and by words and insinuations poisoned the mind of the said Joseph Leonard against his brother Alvah, to such an extent that said Joseph possessed an intense hatred of his said brother, and was induced by said hatred to give all his property to James and his family by will, said will is invalid and should be set aside.' "

If there was evidence that the execution of the will was procured by the exercise of undue influence, then the instruction given was erroneous, because it withdrew from the consideration of the jury that element of the case. If there was no evidence of undue influence, the direction of the court was right. The burden of proof was upon the appellants, and, if the evidence in the cause entirely failed to sustain any one of the grounds upon which the validity of the will was assailed, the court had the right to withdraw the consideration of such ground, and to instruct the jury to disregard it. *Faris v. Hoberg*, 134 Ind. 269; *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18; *Palmer v. Chicago, etc., R. Co.*, 112 Ind. 250.

It is necessary, therefore, to ascertain what constitutes undue influence within the meaning of the law, and then to determine whether there was any evidence of such undue influence before the court and jury. "Undue influence has been defined, as that which compels the testator to do that which is against his will, through fear, or the desire of peace, or some feeling which he is unable to resist, and 'but for which the will would not have been made as it was.' " Red-

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field Law of Wills (4th ed.), p. 530; 27 Am. & Eng. Ency. of Law, p. 495, and notes. Again, it is said that, "the influence must be undue, in order to vitiate the instrument, because influences of one kind or another surround every rational being, and operate necessarily in determining his course of conduct under every relation of life. Within due and reasonable limits such influence affords no ground of legal objection to his acts. Hence mere passion and prejudice, the influence of peculiar religious or secular training, of personal associations, of opinions, right or wrong, imbibed in the natural course of one's experience and contact with society, cannot be set up as undue to defeat a will, if, indeed, it were possible to gauge the depth of such influences at all. 'It is extremely difficult,' as Lord Cranworth has observed, 'to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud.' Not even can the circumstance that the influence gained by one individual over another was very great, be treated as undue in our present connection; especially if the person influenced had free opportunity and strength of mind sufficient to select what influences should guide him, and was in the full sense legally and morally a responsible being." Schouler on Wills, §227; *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Wingrove v. Wingrove*, 11 Prob. Div. 81.

The American editor of Jarman on Wills in an exhaustive note on the subject of undue influence states the law thus: "The test to be applied is agreed to be this: Was such influence brought to bear as to take away, that is, did it take away, the supposed testator's free agency, in this instance? * * * Unfree agency in a case of undue influence is simply this: The apparent testator is but the instrument by which the mastering desire of another is expressed; the supposed will, or the particular part in question, is not the will of the supposed testator except in the sense that he has

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consented to put his name to the instrument in the form in which it appears. Of course yielding to influence is consistent with free agency; agency is free in the eye of the law, however much the agent is influenced by other men until the influence amounts to domination of the will. Thus, persuasion and argument are not improper, so long as they do not overcome free agency." 1 Jarman on Wills (note), p. 66; *Dale's Appeal*, 57 Conn. 127.

We have been unable to find in the great mass of testimony in this case any evidence of the existence of undue influence, or its exercise upon the mind or sensibility of the deceased in connection with the disposition of his estate by his will. In the course of his dealings with his brother Alvah, extending through many years, he had formed an unfavorable opinion of his character, and he cherished a feeling of resentment against him. These sentiments were shared by James Leonard, the brother to whom the estate was devised, and, when the conduct of Alvah was the subject of conversation between the brothers, James freely expressed his antipathy to Alvah. It does not appear that the disposition of the property of the deceased was ever mentioned by James, or that James attempted to influence his brother Joseph in any way concerning such disposition. It was not shown that he advised Joseph to make a will, and it was proved that he was ignorant of the fact that a will had been made, until January 5, 1895, some six years after its execution. The deceased, during his life, manifested but little affection for the children of his sister, and their habits and behavior were severely commented on by him. But these impressions were the result of his own observation and experience, and there was no evidence that they had been artfully or wrongfully created by another, who wished thereby to influence the mind of the deceased, and to divert from any of these relatives such portion of his estate as the deceased would otherwise have bestowed upon them. It cannot be said that the disposition made of his estate by the

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deceased was an unnatural one. He had neither wife nor child, so that his property, if not disposed of by will, would have been scattered among collateral relatives. He had the right to favor those whom he loved and trusted, and from whom he had received nothing but respect and kindness, and to disappoint the expectations of other relatives who had, justly or unjustly, incurred his ill-will or aversion. The fact that some of the relatives of the deceased were needy, is, of itself, entitled to little weight.

In *Goodbar v. Lidikey*, 136 Ind. 1, this court said, on p. 6: "Indeed, we think that the presumption in favor of the validity of a will should be increased rather than diminished from the circumstance that a bequest was made to one with whom the testator had maintained intimate and confidential relations during life. A will, in fact, is usually made in order to give property to those whom the testator desires to favor. If it were the desire that the property should go in due proportions to those equally related to the testator, then no will would be necessary. The law itself would make such distribution in the most equitable manner possible. This is particularly the case where, as in this case, the testator had neither wife nor children, and his property, if not devised, would go to collateral relations."

There was no evidence whatever that the deceased was, by any means, constrained to do what was against his will, and what he would not do if left to himself. There was here neither coercion nor fraud. The will of the deceased faithfully reflected *his* desires, *his* passions, *his* prejudices, and not the desires, passions, or prejudices of another. He kept it by him for more than six years, and his purposes, as expressed in the will, remained steadfast during all that time. When his life and strength were ebbing away, he spoke of his will but intimated no inclination to alter or revoke it. Under this state of the evidence, the duty of the court was clear, and it did right in withdrawing from the jury the question of undue influence.

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The third point made by counsel for appellants is that the court erred in giving to the jury instruction numbered fifteen, in these words: "A person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind and competent to make a will; and while the law will subsequently permit him to testify to the contrary, because the truth, if such it be, should be learned, yet the jury trying the case may consider the fact of such implied contradiction in weighing his testimony."

It is said by counsel that "this instruction is erroneous, first, because it does not state the law correctly, and second, even if it is correct in the abstract, it usurps the province of the jury in determining a question of fact, and in passing upon the credibility of a witness of which the jury is the exclusive judge." While it is not necessary to the validity of a will that the subscribing witnesses should know that the instrument they attest is a will, yet, in the absence of proof to the contrary, they will be presumed to have had such knowledge when they attested it. The view of the law contained in the above instruction is sanctioned by very high authority. In *Schribner v. Crane*, 2 Paige 147, Chancellor Walworth said: "No person is justified in putting his name as a subscribing witness to a will, unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied, from his own knowledge of the state of the testator's mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument, the witness, in effect, certifies to his knowledge of the mental capacity of the testator; and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead, or is out of the jurisdiction of the court."

"It seems to be supposed" says Judge Redfield, "that they [the subscribing witnesses to a will] are only witnesses to

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the act of signing. But when it is considered that the witnesses to a will must certify to the capacity of the testator, as well as to the act of execution, the transaction begins to assume a somewhat different aspect. One who puts his name as a witness to the execution of a will, while he was conscious that the testator was not in the possession of his mental faculties, places himself very much in the same attitude as if he had subscribed, as witness, to a will which he knew to be a forgery, which every honorable man could only regard as becoming accessory to the crime by which the will was fabricated; so that it is not improbable that the want of proper appreciation of the discredit resulting from the act of becoming a witness to the execution of a will, by one confessedly incompetent to the proper understanding of the instrument, may, and probably does, result chiefly, with us, from the general misapprehension of the law upon the subject, rather than from any settled disposition to disregard its dictates if correctly understood." 1 Redfield on Wills (note), p. 96.

Lord Camden early pointed out how peculiar a stress the statute of frauds had laid upon the quality and office of the witnesses to a will as distinguished from other transactions. He says: "And the only question that can be asked in this case is, was the testator in his senses when he made it? And consequently, the time of execution is the critical minute that requires guard and protection. Here you see the reason why witnesses are called in so emphatically. * * * Who then shall secure the testator in this important moment from imposition? Who shall protect the heir at law, and give the world a satisfactory evidence that he was sane? The statute says, three credible witnesses. What is their employment? I say, to inspect and judge of the testator's sanity before they attest." *Hindson v. Kersey*, 4 Burn's Eccl. Law 119.

In *Tatham v. Wright*, 2 Russ. & My. 1, where two subscribing witnesses had declared that they would testify against the testator's capacity, Tindal, C. J., made this severe

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comment: "The real question is, whether these witnesses are to be believed upon this evidence in contradiction to their own solemn act in the attestation. * * * That is the problem to be solved."

A writer of great authority says: "The signature of an attesting witness, when proved, is evidence of everything upon the face of the instrument, for it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place; and where there are several attesting witnesses, all of whom are accounted for, proof of the handwriting of any one is sufficient without proving that of the rest." *Starkie on Ev.*, (10th Am. ed.), p. 519.

The same author says, elsewhere: "The law requires the testimony of the subscribing witness, because the parties themselves, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument, and of the circumstances which then took place, and because he knows those facts which are probably unknown to others." *Starkie on Ev.* (10th Am. ed.), p. 504; *Chaplin on Wills* 92.

In *Schouler on Wills*, §181, this sensible observation is found: "One should only subscribe as witness when he can conscientiously testify without reserve in favor of the will, and its proper execution; and it is for the true interest of every rational testator to procure witnesses who will stand resolutely by the transaction against all insidious or open opposition to the probate." *Pence v. Waugh*, 135 Ind. 143, 155.

It cannot be thought possible that an honest man, of ordinary intelligence, would subscribe his name as a witness to an instrument executed by a person whom he believed to be of unsound mind, or under coercion or constraint. The fact that such a man voluntarily identifies himself with the transaction as a witness is an indication that, in his opinion, the person executing the instrument is competent to do so. The

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witness must be understood to attest not merely the act of signing, but also the mental capacity of the testator to sign. A subscribing witness may, it is true, be heard to impeach the will; but, if he assumes that attitude toward it, he does so at the peril of his reputation for candor and veracity. Such an attitude is not merely inconsistent with the position he has voluntarily taken, but is suggestive of fraud and double dealing. It involves a betrayal of confidence, and, if the witness is believed, in some instances, it may be attended with the most distressing consequences. The credibility of the witness becomes at once a matter of serious inquiry, and his desertion of his position as a sustaining witness is an important fact for the consideration of the jury. In such a case, it is entirely proper for the court to inform the jury that they may consider the fact of such implied contradiction, if they find that it exists, in weighing his testimony. A direction of this character is not an invasion of the province of the jury; nor is it objectionable on the ground that it singles out a witness for attack or criticism. It is the duty of the court, in all cases, to instruct the jury upon the law of the case, whether the testimony of one witness or the testimony of a score of witnesses is comprehended within the rules necessary to be stated for their guidance.

In the instruction under examination, the court did nothing more than declare, as it was competent for it to do, a familiar rule of law, leaving the application of it entirely to the jury, and without giving them to understand what his own opinion on the subject was. *Commonwealth v. Selfridge*, 1 Horr. & Thompson Cases on Self Defense 1.

"The court should not express any opinion on the *weight* of evidence, nor on the credibility of particular witnesses.
* * * But general rules for weighing and reconciling the evidence, and as to what the jury *may* consider in determining the credibility of witnesses, so long as the court does not trench upon the province of the jury, may properly be

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given in almost every case." Elliott's Gen. Pr., §901, and cases cited in note 1.

Undue prominence was not given in this instruction to any particular portion of the evidence, nor was the attention of the jury directed to an isolated and prominent feature of the testimony in such a manner as to mislead them, or indicate the opinion or bias of the court, to the injury of the appellants. The wholesome rules stated in the cases referred to by counsel for appellants were not violated, nor did the court in any respect usurp the functions of the jury. There was no dispute as to the fact that one of the subscribing witnesses was called by appellants, and that his testimony tended to impeach the will. The court might, with propriety, have said much more than it did; it could not, in justice to the parties, have said less, or stated an indisputable rule more fairly. *Paris v. Strong*, 51 Ind. 339; *Stanley v. Montgomery*, 102 Ind. 102; *Union, etc., Co. v. Buchanan*, 100 Ind. 63, 81; *Finch v. Bergins*, 89 Ind. 360; *Cheatham v. Hatcher*, 30 Gratt. (Va.), 56; 25 Am. & Eng. Ency. of Law, 1017, note 2; 29 Am. & Eng. Ency. of Law, 203, note 1.

In connection with instruction numbered fifteen, the court, by instruction numbered seventeen, clearly admonished the jury that they were the exclusive judges of the weight of the evidence, and that the court had no right to invade their province of determining what the evidence proved. They were further told that they had the right to decide upon the credibility of each witness. In the light of the authorities which we have cited, it is evident that the jury were properly instructed, and that there was no error in this part of the proceedings of the court.

It was also assigned, as a ground for a new trial, that the court permitted the following evidence to be given to the jury over the objection of the appellants: "Q. State what, if anything, he [Alvah] was saying to the crowd about the conduct of his brother Joseph in that partnership transac-

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tion? A. Mr. Leonard said that his brother Joseph had had an opportunity to take advantage of the other brothers, and that he improved every opportunity, right and left, and that he had robbed the other brothers of what was justly due them, and a variety of expressions of that sort, and he seemed very much excited about the matter, and talked in rather a loud tone of voice for him."

It is objected that this evidence was inadmissible for any purpose, but we cannot so regard it. The theory of the appellants was that the unfriendly feelings entertained by the deceased toward his brother Alvah were the result of mere delusions of fancy, and were without substantial foundation in point of fact. Much testimony was introduced by appellants to show the existence of these unnatural sentiments, and on the other hand the appellees undertook to account for them by proving that Alvah's conduct in various business transactions had created enmity between him and Joseph. The actual state of the relations between Alvah and Joseph, therefore, became a material fact in the case, and proof that Alvah reciprocated the feelings of distrust and dislike cherished by his brother Joseph, and that he publicly denounced Joseph as a dishonest and unscrupulous man, was entitled to some weight upon the question whether Joseph's aversion for Alvah was but the hallucination of an enfeebled or distracted mind. It was not necessary, in our judgment, for the appellees to show that the accusations made by Alvah came to the knowledge of Joseph before the latter made his will. The state of Joseph's feelings toward Alvah was established. The attitude of Alvah toward Joseph was an important factor in the investigation of the question whether Joseph's dislike of Alvah was natural or unnatural; whether it sprang from a collision of views and interests in real transactions, or was the offspring of a mental malady. We think the evidence was properly admitted, and that, as an indirect and collateral fact, it had a tendency

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to establish the reasonableness of the conduct and sentiments of Joseph Leonard toward his brother Alvah.

In the next place, the appellants complain of the answer of Dr. Beer, an expert, to a question touching the mental condition of the deceased. The question and answer were as follows: "Q. Now, Doctor, let me ask you this question. Whether from your conversation with him, and from an examination of him, his appearance, and everything at that time, whether Joseph Leonard, on the 12th day of December [the date of the will] was or was not laboring under an insane delusion, or anything of that kind?" To which question the witness answered: "No, he was not." Appellants excepted to this question and answer. The objection is made that the answer of the witness is the statement of a fact, and not the expression of an opinion. This construction of the answer seems to us entirely without warrant. The witness having been shown to possess the requisite qualifications of an expert, and having seen, conversed with, and examined the supposed testator, was authorized by the rule of evidence applicable in such cases to express his opinion as to the soundness of the mind of the deceased. His answer was in the usual form, and could not have been understood by the court or jury as anything more than an opinion, as all such evidence in inquiries of this character must necessarily be. There was no error in the action of the court upon the exception to this evidence.

The last alleged error discussed by counsel for appellants is the refusal of the court to set aside the verdict because of the supposed misconduct of one of the jurors. This question, however, was tried in the court below upon affidavits and counter-affidavits, and we must presume, in the absence of a very clear showing to the contrary, that the decision of the trial court was correct. It is proper to add that the record shows that the affidavit filed in support of appellant's motion was made upon information only, and that it was directly contradicted not only by the affidavit of the juror,

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but also by the affidavit of the person from whom the pretended information was alleged to have been derived.

Other errors are assigned, but as they are not discussed by counsel for appellants, they must be treated as waived. Finding no available error in the record, the judgment is affirmed.

SIMONS ET AL. v. BOLLINGER.

[No. 18,779. Filed January 24, 1900.]

HUSBAND AND WIFE.—Deeds.—Joint Tenancy.—Estates by Entireties.—A deed of conveyance to a husband and wife containing the word "jointly" in the granting clause does not create an estate of joint tenancy, but one of entireties, the word "jointly" being mere surplusage.

From the LaGrange Circuit Court. *Affirmed.*

F. J. Dunten, J. E. McClaskey and J. M. Van Fleet, for appellants.

J. S. Drake, F. D. Merritt, A. Zollars and C. H. Worden, for appellee.

HADLEY, C. J.—Kerr and wife held land conveyed to them by deed in the words following: "Convey and warrant to David S. Kerr and Clara Kerr, his wife, *jointly* the" etc.

The only question presented for decision is whether the words employed created in David and Clara Kerr an estate in joint tenancy, or an estate by entireties. It is agreed that if they create an estate in joint tenancy, the judgment should be reversed; and if an estate by entirety, it should be affirmed. It is also conceded by appellant that "the omission from the deed of the word 'jointly' would clearly make Kerr and wife tenants by the entirety; so that the exact question is, does that word make then joint tenants?"

Section 3341 Burns 1894, §2922 Horner 1897, follows: "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create

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estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy."

The exception is in these words: "The preceding section shall not apply to mortgages, nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors or trustees, as such, shall be held by them in joint tenancy."

It will be observed that the question we have here is not controlled by the statutes but must be determined by the rules of the common law. Under the common law the two estates have been recognized from a very early period in the history of the law. The distinctive difference between them is: (1) A joint tenancy may be vested in any number of natural persons more than one; a tenancy by entirety can be vested only in husband and wife. (2) Joint tenants take by moieties, and each is seized of an undivided moiety and of the whole, *per my et per tout*; while husband and wife take each the entirety, *per tout*. (3) Joint tenants may severally alienate their interests; husband and wife can do so only by acting jointly. (4) Joint tenants may sever and continue to hold their estates; the estate of husband and wife is inseverable while it remains theirs. (5) Joint tenants may have partition; husband and wife can not, during the marriage. Upon the death of one joint tenant, his estate is cast upon the survivors, and the last survivor takes the whole. Upon the death of husband or wife, the survivor takes the whole. Freeman on Coten. and Par. §64.

Undoubtedly there is an element of joint holding in both estates. Joint tenants hold jointly the whole and the several parts; tenants by the entirety hold jointly the whole. This common jointure has been recognized by eminent authors in treating of tenancies by entireties as a species of joint tenancy.

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"A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such." 1 Washb. Real Prop. (4th ed.), p. 672.

Preston says: "Tenancy by entireties is when husband and wife take an estate to themselves jointly, by grant or devise." 1 Preston on Estates, 129.

"This is a peculiar tenancy and arises at common law when an estate is conveyed or demised to a husband and wife jointly during coverture." Wharton's Conv. 121.

"Tenancy by entireties occurs, * * * 'where the husband and wife are jointly seized to them and their heirs of an estate made during the coverture.' * * * It constitutes the most intimate union of ownership known to the law." 2 Challis on Real Prop., 281.

In many of our cases this court has referred to the seizin of husband and wife as being joint. In *Bevins v. Cline*, 21 Ind. 37, it is said: "There are four kinds of joint tenancy at common law, viz.: In common, in parcenary, in joint tenancy and in tenancy by entireties. * * * If a conveyance of land be made to a man and woman, who are then husband and wife, they take as joint tenants by entireties." To the same effect, see *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Jones v. Chandler*, 40 Ind. 588, 592; *Anderson v. Tannehill*, 42 Ind. 141; *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254; *Phelps v. Smith*, 116 Ind. 387, 391; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Morrison v. Seybold*, 92 Ind. 298.

In *Hadlock v. Gray*, 104 Ind. 596 at page 598, it was said by Elliott, J.: "It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety." It is also said by Hackney, J., in *Brown v. Brown*, 133 Ind. 476 at page 477: "The question is now well settled in this State, that if a conveyance be made to husband and wife jointly and without words limiting the estate taken, they will take as tenants in entirety."

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Words of like import abound in our text-books and adjudicated cases in referring to estates of husband and wife, and while it is well settled that technically the estate of joint tenancy and estate by the entirety are separate and distinct estates, yet the frequent reference by courts and authors to them both as joint estates, whatever the fact may be, should be of service in determining the legal effect of the word "jointly" as used in the deed under review, and whether the word was aptly or inaptly employed. Moreover, joint tenancies had their origin under a government that discouraged the severance of landed estates, to promote which policy all conveyances to two or more persons, except to husband and wife, were held to be joint tenancies, unless, by clear and apt words of limitation, some other was described. All presumptions and doubts were turned to the support of joint tenancies. *Case v. Owen*, 139 Ind. 22; *Freeman Coten. and Par.* §18. In this country, the policy and rule of construction are directly reversed. In this and most of the states, from our earliest history, the political policy has been to encourage the distribution of lands among the people, to advance which all conveyances to more than one person, except to husband and wife, have been construed to be tenancies in common, unless another estate is fixed by express and definite words of limitation. *Carver v. Smith*, 90 Ind. 222.

Sections 3341, 3342 Burns 1894, which are reenactments of former statutes to same effect, emphasize two propositions, viz.: (1) That joint tenancies must be held in disfavor and refused, except when forced by clear and unmistakable words, and (2) that the rule of the common law, as applicable to conveyances to husband and wife, should remain undisturbed in this State. The strength of that rule is stated by an eminent author in these words: "But if our theory needs any further support, this support is found in the fact that all the English adjudications upon this subject, as well as all the earlier writers upon the common law, assert

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that husband and wife can not, by any words of limitation, however well chosen for that purpose, receive an estate as joint tenants." Freeman on Coten. and Par. (1st ed.), §64. While the rule has been somewhat relaxed in this State in deference to the contractual rights of parties, the rule, nevertheless, exists that all presumptions must be indulged and all doubts resolved against such estates, and in favor of estates by entireties in conveyances to husband and wife.

The words "Convey and warrant to David Kerr and Clara Kerr, his wife, jointly" do not in terms create in the spouses a joint tenancy; and whether the word "jointly" was intended to relate to the union of the title and enjoyment, or to characterize the seizin and tenancy, or whether it was inaptly used by the grantor, and without legal signification (as we have seen so frequently happen with eminent authors and judges) is not altogether free from doubt; but, however this may be, it is clear that, under the rule above stated, we must construe it to be surplusage, and the estate conveyed one of entireties.

The cases of *Thornburg v. Wiggins*, 135 Ind. 178, 22 L. R. A. 42, and *Wilkins v. Young*, 144 Ind. 1, are not analogous. In each of these the words employed were "in joint tenancy", the very language of the books, and we are satisfied that the application of the rule in these cases was as liberal as is warranted by the authorities. *Case v. Owen*, 139 Ind. 22, has no application. In the *Owen* case, the grantees were unmarried.

Judgment affirmed. Baker, J., did not participate.

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[No. 18,482. Filed Nov. 14, 1899. Rehearing denied Jan. 24, 1900.]

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FRAUDULENT CONVEYANCES.—*Action to Set Aside.—Burden of Proof.*

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—*Evidence.—Notice.—Sales.*—In an action to set aside a sale and transfer of personal property as fraudulent as against creditors, the burden of proof is upon plaintiff to establish that defendant sold and transferred the property with the fraudulent intent to hinder or delay his creditors, and that the purchaser paid no consideration therefor, or, if he paid a valuable consideration, that he purchased with notice or knowledge of the fraudulent intent of the seller. *p. 89.*

SAME.—*Fraud.—Presumptions.*—Fraud cannot be presumed in an action to set aside a transfer of personal property as fraudulent, but is a question of fact which must be proved. *p. 89.*

SAME.—*Fraud.—Presumptions.*—Where in an action to set aside a transfer of personal property as fraudulent the facts are consistent with either honesty and good faith or dishonesty and bad faith, the presumption of honesty and good faith will prevail. *pp. 89, 90.*

APPEAL AND ERROR.—*Fraudulent Conveyances.—Evidence.—Review.*—In an action to set aside a transfer of personal property on account of fraud, the question whether the facts and circumstances proved the alleged fraudulent intent, or authorized such an inference, was one of fact for the determination of the trial court, and is not reviewable on appeal. *p. 90.*

From the Elkhart Circuit Court. *Affirmed.*

W. H. Hauenstien, J. H. State, L. Chamberlain, J. M. Van Fleet and V. W. Van Fleet, for appellants.

O. T. Chamberlain and P. L. Turner, for appellees.

MONKS, J.—Appellants sued to recover personal judgments against appellee Reed for the amounts due them respectively, and to set aside as fraudulent certain sales of personal property made by said appellee to his co-appellees. Upon the trial of said cause the court found for appellants as to their respective claims against said Reed, and against said appellants upon that part of their complaint which sought to set aside the sales of said personal property as

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fraudulent, and over appellants' motion for a new trial judgments were rendered against said Reed for the amounts found due appellants respectively, and in favor of the other appellees against appellants for costs.

Appellants insist that the trial court erred in overruling their motion for a new trial, because the finding of the court was contrary to law. The burden of proof was upon appellants to establish, among other things, that appellee Reed sold his said personal property to his co-appellees with the fraudulent intent to cheat, hinder, or delay his creditors, and that said co-appellees paid no consideration therefor, or if they paid a valuable consideration therefor that they purchased with notice or knowledge of the alleged fraudulent intent of Reed. *Scott v. Davis*, 117 Ind. 232, 233; *McFadden v. Ross*, 126 Ind. 341, 346; *Willis v. Thompson*, 93 Ind. 62, 64; *Bank v. Carter*, 89 Ind. 317, 322.

In this class of cases, under our statute, there is no such thing as fraud in law, but fraud is a question of fact which cannot be presumed but must be proved, because the presumption is always in favor of honesty and fair dealing, and against bad faith. §4924 R. S. 1881 and *Horner* 1897, §6649 *Burns* 1894; *Bank, etc., v. Gear Co.*, 143 Ind. 550, 557; *Bruner, Rec., v. Brown*, 139 Ind. 600, 609, 610, and cases cited; *Rockland Co. v. Summerville*, 139 Ind. 695, 699, 700; *Fulp v. Beaver*, 136 Ind. 319, 322; *Hutchinson v. Bank*, 133 Ind. 271, 282, 283; *Bank v. Findley*, 131 Ind. 225, 228, 229; *Coal Co. v. Terre Haute, etc., Co.*, 129 Ind. 73, 81; *Cicero Tp. v. Picken*, 122 Ind. 260, 263; *Wallace v. Mattice*, 118 Ind. 59; *Phelps v. Smith*, 116 Ind. 387, 393, 394; *Stix v. Sadler*, 109 Ind. 254, 258; *Caldwell v. Boyd*, 109 Ind. 447, 455, 456; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 446-449; *Rose v. Colter*, 76 Ind. 590; *Morgan v. Olvey*, 53 Ind. 6; *Stewart v. English*, 6 Ind. 176; *Lawson on Presumptive Ev.* (1st ed.) pp. 93, 98, 439, 440, (2nd ed.) pp. 112, 117, 118, 517, 518.

It is also the rule that when the facts of a case are con-

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sistent with either honesty and good faith or dishonesty and bad faith the presumption of honesty and good faith will prevail. *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 448, 449; *Bradish v. Bliss*, 35 Vt. 326; Wait on Fraud. Con., §§5, 6; 2 Thompson's Trial Prac., §§1938, 1939, 1940.

We have carefully read the evidence, and, considering the same in view of the foregoing rules and presumptions, we are unable to say that said finding of the court is contrary to law, and cannot therefore disturb it.

Many facts and circumstances were given in evidence which were proper to be considered by the trial court in determining whether or not Reed made the sales of his personal property to appellees with the fraudulent intent alleged, and whether or not appellees had notice or knowledge of such intent if it existed; but what inference should be drawn from said facts and circumstances was a question for the trial court, and not for this court, unless perhaps they were such that only one inference could be drawn therefrom. *Elliott's Gen. Prac.*, §429. Moreover there was a conflict in the evidence as to some of the facts and circumstances given in evidence. Badges of fraud are not fraud, however, but simply evidence of fraud. From the facts and circumstances in evidence the law draws no inference of fraud. Whether such facts and circumstances proved the alleged fraudulent intent of Reed, or authorized such an inference, which was one of fact and not of law, was for the trial court to determine as the trier of the facts. This court cannot, therefore, review the inference drawn therefrom by the trial court, whatever it may have been, because to do so would be to weigh the evidence and determine its sufficiency to establish the alleged intent, a right we do not possess.

There is no direct evidence that the appellees who purchased said personal property had any notice or knowledge that Reed sold the same with the intent alleged, but on the contrary all who were examined as witnesses testified that

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they had no such notice or knowledge, and that they made the purchases in good faith for a valuable consideration. Appellants insist, however, that the facts and circumstances given in evidence, which were known to appellees, were sufficient to put a man of ordinary prudence upon inquiry, and that therefore they must be charged with knowledge of Reed's alleged fraudulent intent. Whether the facts and circumstances in evidence were sufficient to put a man of ordinary prudence upon inquiry was a question of fact to be determined by the court trying the cause, and not a question of law. The decision of the trial court upon that question is not therefore subject to review here; to do so would be to weigh the evidence and determine its sufficiency to establish knowledge on the part of said appellees. In this case the trial court was required to, and did, consider and pass upon the credibility of witnesses, made presumptions, and drew inferences, and, even if the nature of the evidence was such that different persons might reasonably arrive at a different conclusion from that reached by said court, the finding cannot be set aside for that reason.

It is evident that the rule that this court cannot reverse a case upon the weight of the evidence is clearly applicable here. Judgment affirmed.

Baker, J., took no part in the decision of the cause.

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[No. 18,688. Filed Oct. 5, 1899. Rehearing denied Jan. 24, 1900.]

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162 655

APPEAL AND ERROR.—*Record*.—Assignments of error based upon the rulings of the court on the pleadings cannot be considered on appeal, where the pleadings in question are not in the record. *pp. 92-94.*

SAME.—*Amendment of Pleading*.—*Record*.—When an amended pleading is filed it supersedes the original and the latter goes out of the record, and cannot be considered on appeal unless brought into the record by bill of exceptions. *p. 94.*

CONTINUANCE.—*Discretion of Court*.—An application for a continuance is addressed to the sound discretion of the trial court, and

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unless it is clearly disclosed that such discretion has been abused, to the injury of the complaining party, the refusal to grant the continuance will not be available error on appeal. pp. 94-96.

CONTRIBUTORY NEGLIGENCE.—Knowledge of Danger.—Personal Injuries.—The fact that one injured on a defective sidewalk had previous knowledge in respect to the defective condition of the sidewalk is not alone conclusive upon the question of her contributory negligence so as to prevent a recovery for the injuries sustained, where it is not disclosed that she knew it was unsafe or dangerous. pp. 96, 97.

From the Wabash Circuit Court. *Affirmed.*

J. F. France, Z. T. Dungan, J. B. Kenner, U. S. Lesh and O. H. Bogue, for appellant.

M. L. Spencer and W. A. Branyan, for appellee.

JORDAN, C. J.—Appellee sued in the Huntington Circuit Court to recover damages for personal injuries sustained by her through appellant's alleged negligence in maintaining a defective sidewalk. The venue of the cause was changed to the Wabash Circuit Court. There was a trial by jury in the latter court and a general verdict returned in favor of appellee, assessing her damages at \$5,000, and along with this verdict the jury returned answers to a number of interrogatories. Over appellant's motion for judgment in its favor upon these answers, notwithstanding the general verdict, and over its motion for a new trial, the court rendered judgment on the general verdict.

Counsel for appellant concede that the evidence is not properly in the record, and the only errors of those assigned which they argue are that the court erred as follows: (1) In overruling appellant's motion to require appellee to make her amended complaint more specific; (2) in overruling the demurrer to the amended complaint; (3) in overruling appellant's application for a temporary continuance; (4) in overruling the motion for judgment on the answers of the jury to interrogatories.

What purports to be the original complaint is copied by the clerk into the transcript. A motion to make this complaint more specific, it appears, was filed by appellant on

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September 6, 1895, in the Huntington Circuit Court. The case was filed on change of venue in the Wabash Circuit Court on April 2, 1896. On May 5, 1897, appellee filed in a single paragraph what is denominated in the record as "a substituted complaint". After the filing of this latter complaint, appellant moved the court to require appellee to make her complaint more specific in this: To state in a specific manner, "(1) what the defect was that caused the alleged fall and injury; (2) the exact point where the fall occurred; (3) what lot of Mr. Black's was the defect in the walk in front of. Give number of lot."

The record recites that pending this motion leave was granted by the court to appellee to amend the complaint, and that the same was amended; and the court then overruled the motion to make more specific and granted appellant thirty days in which to file a bill of exceptions. The complaint, as amended, is not in the record; therefore the character or nature of the averments of this pleading, as it existed after the aforesaid amendment was made, is not disclosed.

The bill of exceptions recites the grounds upon which the motion to make more specific was based, and that it was overruled, but is entirely silent as to the amendment which appellee made to her complaint, and we are left wholly ignorant in regard to its allegations, after the amendment in question was made, and are uninformed as to what was disclosed upon the point of controversy after the complaint was changed by the amendment made pending the motion to make more specific. For aught appearing, appellee may have amended her pleading so as to conform to the demands of appellant, and that therefore, and for that reason, the motion was denied.

It is evident from the condition of the record that we are not in a position to review the action of the trial court in denying the motion in controversy. After the overruling of this motion, appellant seems to have demurred to the

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complaint for insufficiency of facts, and the transcript discloses that, pending this demurrer, upon leave granted, appellee again amended her complaint, and that the court thereupon overruled the demurrer; but neither is the complaint, as amended on this second occasion, nor the particular changes made therein by the latter amendment, set forth in the record. Nothing, therefore, appearing to the contrary, we may assume that the infirmities of the pleading, of which appellant complains, were completely cured by the amendments made pending the demurrer, and before the court overruled it.

The rule is well settled that when an amended pleading is filed, it supersedes the original, and the latter goes out of the record; consequently, by this last amendment, the complaint, to which the demurrer was addressed, was taken out of the record and can not be considered a part thereof on this appeal. The complaint, as last amended, we must presume to be the one upon which the cause was tried, and as this pleading, after it was amended, in no manner appears in the record, therefore no question is presented for review upon the assignment of error based upon the action of the court in overruling the demurrer to the complaint, or that the latter does not state facts sufficient to constitute a cause of action.

It is manifest that when a pleading, upon which error is specified on appeal to this court, is absent from the record, no question, in respect to its sufficiency, can be considered. We have repeatedly affirmed that all cases in this court are tried by the record and that all erroneous rulings complained of must be properly exposed thereby, as all reasonable presumptions will be indulged in favor of the rulings of the trial court.

Appellant contends that the court erred in denying its application for a temporary continuance. This ruling of the court was assigned as one of the reasons in the motion for a new trial, the overruling of which motion is also assigned as

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error in this appeal. It is shown by a bill of exceptions that appellant, on May 4, 1897, moved for a continuance, for the reason that at the commencement of the trial the court permitted the plaintiff to amend her complaint by inserting therein the following: "That the walk, as originally constructed, was made with stringers laid parallel with the line of the walk, about six inches apart, and boards laid across them nailed to said stringers, and, as so made, was a safe and suitable walk; but previously to and at the date aforesaid, said boards had been removed from said stringers for about four feet from the northeast corner of the lot aforesaid, leaving the space between said stringers open, in which said space loose boards were thrown and allowed to so remain for three months prior to said date, and were placed about eight inches below the level of the walk."

The motion for a continuance was supported by affidavit which is embodied in the bill of exceptions. This affidavit, among other things, refers the court to the original complaint, and states that the latter is made a part of the affidavit. It is further averred therein that nothing is alleged in the original complaint, which is stated to have been filed on April 1, 1895, about the defects which caused the injury to plaintiff, and that the changes made by the amendment will require new and additional proof upon the part of the defendant, etc. Neither the original complaint referred to in the affidavit nor any of its averments are embraced in the bill of exceptions. The original complaint, being superseded by the filing of the substituted or amended complaint, as heretofore shown, was no longer in the record; and, as appellant has failed to incorporate it therein by a bill of exceptions, or order of court, it can not be considered on appeal for any purpose.

In the absence, therefore, of that pleading, we are not advised in respect to its allegations or the particular theory which it advanced; and certainly, under such circumstances, we are not in an attitude to determine whether the amend-

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ment in question so changed or varied the original complaint as to introduce into the action a new theory or create such an essential difference between it and the amended complaint as to require, upon the trial, on appellant's part, as it is claimed, additional proof.

The lower court had the advantage of having before it both the original complaint and the affidavit filed in support of the motion for a continuance; and was fully advised, we must presume, in respect to the facts therein averred and the statements made in the affidavit; and, therefore, under the circumstances, was in a much better position than we are to determine whether the appellant had shown a good cause for continuance by reason of the amendment made to the complaint in controversy.

Under §394 R. S. 1891 and Horner 1897, §397 Burns 1894, an application for a delay or continuance of a cause is addressed to the sound discretion of the trial court, and where, as in this case, for the reasons stated, it is not clearly disclosed on appeal that such discretion has been abused, to the injury of the complaining party, the refusal to grant the continuance will not be available error. *Moulder v. Kempff*, 115 Ind. 459; *Cerealine Mfg. Co. v. Bickford*, 129 Ind. 236; *Brandt v. State, etc.*, 17 Ind. App. 311. *Danley v. Scanlon*, 116 Ind. 8, under the facts as presented on the question involved, lends no support to appellant's contention.

It is finally urged that the court ought to have sustained appellant's motion for judgment in its favor upon the answers of the jury to the interrogatories, notwithstanding the general verdict, for the reason, as asserted, that these answers disclose that appellee was guilty of contributory negligence. We have read and considered the interrogatories and discover no grounds for affirming that they are antagonistic, upon that question, to the general verdict. They reveal that when appellee stepped upon the sidewalk, at the time of the accident, she looked to see where she

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stepped, and that the board upon which she placed her foot appeared to be safe and firm to walk over; that there was no sidewalk on the opposite side of the street and that the weather, on the day of the accident, was intensely cold, and the sidewalk where the accident occurred was her shortest and most usual route in going to and from the business portion of the city of Huntington.

While it is true that the interrogatories show that appellee, prior to the time she was injured, had passed over the walk and knew of its defective condition, still there is nothing in the special findings to disclose that she knew it was unsafe or dangerous. Her previous knowledge in respect to the defective condition of the sidewalk would not alone be conclusive upon the question of her contributory negligence and thereby preclude a recovery by her upon the general verdict. *Citizens Street R. Co. v. Sutton*, 148 Ind. 169, and cases there cited.

No available error being shown by the record, the judgment is therefore affirmed.

McCOLLUM v. CLEVELAND, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY.

[No. 18,751. Filed January 25, 1900.]

CONTRIBUTORY NEGLIGENCE.—Complaint.—Railroads.—A complaint against a railroad company for personal injuries alleged that defendant permitted a train of cars to obstruct a street in violation of §2170 Horner 1897; that plaintiff's business required him to cross defendant's tracks, and in so doing he got upon one of the flat cars, walked across to the opposite side thereof, and, in the darkness of the night, leaped to the ground and was injured. *Held*, that the complaint showed plaintiff to be guilty of such contributory negligence as to bar a recovery.

From the Shelby Circuit Court. *Affirmed*.

L. F. Wilson and *D. H. Thompson*, for appellant.

T. B. Adams and *Isaac Carter*, for appellee.

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JORDAN, J.—Appellant filed a complaint in two paragraphs to recover damages for personal injuries. A demurrer was sustained to each paragraph, and the sufficiency of the pleading is presented for review.

A summary of the facts stated in the first paragraph may be said to be as follows: Appellee is a railroad company, and its railroad runs through the town of Fairland, in Shelby county, Indiana. On the occasion of the accident in question, it obstructed the public streets of that town for the period of one hour and thirty minutes, by allowing one of its freight trains, without being parted, to stand upon its side-tracks, and thereby obstructed the passage of persons going north and south on said streets. While these streets were so obstructed by appellee's train, it appears that appellant, as alleged, "had occasion to and was called by matters of pressing business" to go from the saloon, wherein he was engaged as a bartender (this saloon being situated immediately north of the railroad tracks), to a point in the south part of the town, where the business in question seems to have required his immediate personal attention. After waiting for the space of about one hour for appellee to part its train, so as to make a passageway across the tracks, and upon its failure to do so, appellant started along Walnut street, which was the direct route to the point where he desired to go. Upon arriving at appellee's side-track on said Walnut street, he found it closed, or obstructed by the train in question. It is further averred that all of the other streets running north and south across said tracks were also closed or obstructed by said train, and therefore, without great inconvenience, appellant could not pass south over said tracks. That, in order to cross the tracks, he "climbed" upon one of the flat cars composing said train, standing as it then did across said Walnut street, and, believing that he could with safety cross said car, and being "pressed for time", as it is alleged, "he did then and there walk across the flat car to the south side thereof, and jumped therefrom

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to the ground," and was injured. It further appears from the complaint that at the time appellant jumped from the car it was 10 o'clock at night, and when he alighted upon the ground his feet slipped, causing him to fall violently to the ground, whereby his right leg was severely wrenched and the bones thereof were broken. It is further alleged that, by reason of the foregoing facts and the defendant's wrongful and unlawful acts, as charged, the plaintiff has incurred irreparable injury, and has become a permanent cripple.

The averments of the second paragraph of the complaint are substantially the same as the first, except the additional charge is made that appellee was also guilty of negligence in failing to restore the street obstructed to its former condition.

Counsel for appellant, in their insistence that the complaint sufficiently states a cause of action, say: "The theory of each paragraph of the complaint is that the acts of the appellee, which caused the injury, were wilful violations of the statute, and therefore torts, involving the direct violation of a positive and explicit law to which contributory negligence is no defense."

The contention is that the employes of appellee, in charge of said train of cars at the time in question, violated §2291 Burns 1894, §2170 R. S. 1881 and Horner 1897, which relates to the obstruction of a highway by a train of cars and prescribes a penalty therefor. Counsel advance the argument that the injury, of which appellant complains, was due, as shown, to the obstruction of the public streets of the town of Fairland by appellee, which, as asserted, was violative of a positive statute; therefore they say that the injury which their client sustained must be considered as having been by appellee wilfully and intentionally inflicted. Hence, contributory negligence can not defeat the action.

The facts, however, as alleged in the complaint, do not support this proposition. It must be remembered that appel-

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lant is seeking to enforce against appellee a common law liability, and not one provided for by the statute which appellee is said to have violated by obstructing the streets as it did. Even if it could be reasonably asserted, under the facts as disclosed by the complaint, that the unlawful act of appellee in obstructing public streets of the town, as charged, in violation of the statute, was the proximate cause of the injury received by appellant, still his case must be subject to the rule that, in order to recover, there must be absence upon his part of contributory negligence. It can not in reason be said that, on account of its unlawful obstruction of the street or streets, the injury was thereby wilfully or intentionally inflicted by the appellee upon appellant; or, in other words, it can not be affirmed that appellee, by obstructing the streets as it did, must be held to have anticipated that the accident which befell appellant would be the natural and probable consequence of its said act.

The action, under the facts, is based upon the negligence of appellee, and can rest upon no other foundation; and this appellant by his complaint apparently concedes as the pleading alleges that he was free of a contributory negligence at the time he was injured. As, under the facts, he must rest his case upon negligence, he can not invoke, in his behalf, the rule which applies to wilfulness, as the latter does not consist in negligence, and the two terms are the opposite of each other, wilfulness signifying the presence of intention, and negligence, its absence. *Parker v. Pennsylvania Co.*, 134 Ind. 673, 23 L. R. A. 552; *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490, and cases there cited.

The fact that appellee's negligent act in allowing its train to stand across the public streets, so as to obstruct a passage thereon, may have been violative of a positive statute, will not exclude, as a feature of the case, the contributory negligence of appellant. *Ohio, etc., R. Co. v. Hill*, 117 Ind. 56; *Cleveland, etc., R. Co. v. Wynant*, 114 Ind.

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525; *Gartin v. Meredith*, 153 Ind. 16; *Shirk v. Wabash R. Co.*, 14 Ind. App. 126.

The facts in this case, reduced to a simple form, show that appellee had obstructed the street over which appellant desired to pass to reach a certain point in the town where some "pressing business" demanded his personal attention. The obstruction was of such an extent as to make it inconvenient for him to go in the direction he desired. Under these conditions, upon arriving at the street crossing, without demanding that appellee part its train so as to enable him to cross, and without any invitation from it, either express or implied, he got upon one of the flat cars, walked across to the opposite side thereof, and then, in the darkness of the night, without knowing or apparently caring in regard to the danger to which he was subjecting himself, he leaped from the car to the ground, and was injured as a result of his own careless act. That, by so doing, he was guilty of negligence, and that his injury must be attributed thereto, we think is so evident that the question is not open to controversy.

It follows that both paragraphs of the complaint are bad, and that the demurrer was therefore properly sustained.

Judgment affirmed.

OSBORN ET AL. v. MAXINKUCKEE LAKE ICE COMPANY.

[No. 18,871. Filed January 25, 1900.]

DRAINS.—Assessments.—Vacation.—Supplemental Petition.—Defendant by plea in abatement secured an order of court vacating for want of notice certain assessments made against its lands for the construction of a drain. After the work was established and the assessments approved two of the petitioners filed a supplemental petition asking that the benefits to defendant's lands be assessed thereon. *Held*, that the order of court vacating the assessment did not amount to an adjudication that defendant's lands were not benefited, and that the filing of the supplemental petition was authorized by law. *pp. 102-104.*

154	101
138	78
154	101
170	583
154	101
1171	463

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DRAINS.—*Supplemental Petition.*—A supplemental petition showing that lands benefited by a drain were not assessed therefor, and asking that such lands be assessed, may be filed in vacation.

pp. 104, 105.

SAME.—*Supplemental Petition.*—*Notice.*—The court is not required to fix in advance what notice shall be given a landowner by one filing a supplemental petition showing that lands benefited by the construction of a drain were not assessed therefor, and if a proper notice is given, the court is not authorized to set the same aside, *p. 105.*

SAME.—*Final Judgment.*—*Appeal.*—An order of court dismissing a supplemental petition filed under the provisions of §4279 Horner 1897 in a drainage proceeding after the work was established and the assessments approved was a final judgment within the meaning of the statute from which an appeal might be taken. *p. 106.*

From the Starke Circuit Court. *Reversed.*

H. R. Robbins and J. M. Fuller, for appellants.

J. D. McLaren, for appellee.

MONKS, J.—Appellants and others, in 1896, filed in the court below their petition for the drainage of lands in Starke and Marshall counties, under the drainage act of 1885 (Acts 1885, p. 129), §5622 *et seq.*, Burns 1894. In May, 1897, the drainage commissioners filed their report, which named lands owned by Sterling R. Holt as affected by said work which were not named in the petition, and the court fixed June 4, 1897, for hearing said report. Appellee was not named as the owner of any lands described either in the petition or the report of the drainage commissioners. On June 11, 1897, appellee filed what is denominated a special plea in abatement, in which it was alleged, among other things, that appellee was and had been a resident of Marshall county, Indiana, since December, 1897, and has kept and maintained an office in said county since that date; that said appellee is the owner in fee simple of the lands described in the report of the drainage commissioners as owned by Sterling R. Holt, and which were assessed with benefits in a large amount, as shown by said report; that said lands have stood in its name on the tax duplicates and

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transfer books in the office of the auditor of Marshall county continuously since March, 1895, and so stood in its name when said petition was filed; that it is not named in said report of the drainage commissioners as the owner of any land affected by the proposed drain; that it has never received any notice of the filing and pendency of said petition, or the filing of said report. Prayer that the assessment against said lands in the name of said Holt be abated and expunged from the record, and that the description of the lands be erased therefrom. An answer was filed thereto, and, after hearing the evidence, the court found for appellee, and rendered judgment accordingly. On September 10, 1897, in vacation, appellants, two of the petitioners for said drainage whose lands had been assessed with benefits in said proceeding, filed a supplemental petition, in which the lands described in the report of the drainage commissioners as the property of Sterling R. Holt were described, and the benefits assessed to said real estate, as shown in said report, were stated. It was also alleged in said petition that said lands appear of record to belong to appellee, and that an abatement of said cause as to said appellee had been procured for the reason that it was a resident of Marshall county, and it had not been served with notice; that said lands were benefited, as set forth in the report of the drainage commissioners. Summons was issued by the clerk of the court, and duly served on appellee. On October 12, 1897, appellee filed a motion "to strike out and dismiss appellants' said petition, and quash the summons issued thereon, and the return of the sheriff, for the following reasons: (1) Because there is no law authorizing or permitting the filing and prosecution of a supplemental petition in a drainage case in the circuit court after the work has been established, and the assessments approved by the court, and the same assigned to the proper person for construction; (2) because said supplemental petition was filed, and the summons issued and served without any authority of law whatever; (3)

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because the allegations of said supplemental petition show that said assessments against said real estate made by the drainage commissioners were set aside and vacated by the court, and said judgment and decision of the court are in full force and effect." The court sustained said motion. The errors assigned call in question the action of the court in sustaining said motion.

Section 5629 Burns 1894, §4279 Horner 1897, expressly provides that any one interested in a drainage proceeding may file "a supplemental petition showing that lands not mentioned in the original report are affected, as he believes, by such drainage, in which case the court shall require such person to give such notice as it may deem proper and sufficient to the persons affected thereby, and shall refer the same to the drainage commissioners for a report, and any and all proceedings may be had thereon, and orders and decrees made therein, the same as if it were an original petition." After the court had, on the application of appellee, set aside and vacated the benefits assessed against appellee's lands (which were named in the report as the lands of Holt) said lands, in contemplation of said §5629 (4279), *supra*, were not mentioned in the original report of the drainage commissioners. The court, by said order vacating the assessment against said lands, did not adjudge that they were not benefited by the proposed drain, nor that they could not be assessed, but only that the benefits assessed to the lands of appellee were invalid for want of personal notice to appellee. Whether or not this decision of the court was erroneous, we need not, and do not, determine, as the same is not called in question on this appeal by any assignment of error. The effect of the judgment and order of the court in vacating said assessment was to leave appellee's lands the same as if they had never been mentioned in said original report, and without any adjudication as to whether they would or would not be benefited by said proposed drain. Said appellants were, therefore, expressly authorized

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by said §5629 (4279), *supra*, to file a supplemental petition for the purpose of having the benefits, if any, assessed to each tract of real estate owned by appellee. There is nothing in §5629 (4279), *supra*, or any other section of that act, requiring that such supplemental petition be filed in term time, and there is no reason why it was not proper to file the same in vacation. Whether or not such supplemental petition may be filed is not left to the discretion of the trial court, but is a right given to any person interested. The court is not required to fix in advance what notice shall be given. If a proper and sufficient notice is given, the court is not authorized to set the same aside. The notice of said supplemental petition was served by the sheriff by reading the same to, and delivering a copy thereof to, the president of appellee. The notice contained a description of appellee's real estate, and was sufficient to advise appellee that a supplemental petition had been filed in the drainage proceedings of Amos Osborn et al., in the court below, and that the same affected appellee's real estate. It is clear that proper and sufficient notice was given appellee of said supplemental petition, as required by said drainage law. While the supplemental petition is not a model, and contains unnecessary matter, yet it shows that appellee's lands are affected, as appellants believe, by such drainage, as required by §5629 (4279), *supra*. It was the duty of the court below, proper and sufficient notice of said supplemental petition having been given, to refer the same to the drainage commissioners for a report, as required by said section. One of the basic principles of said act is that the entire cost of the improvement must fall on all the lands benefited, in proportion to the benefits which accrue to each tract affected, and that no tract can be assessed in a sum exceeding the amount of benefits resulting to it from the work as adjudged by the court. It was to carry into effect this principle that provision was made for bringing in omitted lands affected by the work, so that all land bene-

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fited thereby should pay its proportion of the cost thereof. It has been uniformly held by this court that the drainage laws are to be liberally construed, so as to promote the object for which they were enacted. And this is the express requirement of §5629 (4279), *supra*. *Rogers v. Voorhees*, 124 Ind. 469; *Steele v. Hanna*, 117 Ind. 333.

Appellee has filed a motion to dismiss this appeal for the reason that the same is not from an appealable interlocutory order, or from a final judgment.

Before the motion to dismiss said supplemental petition and set aside and quash the summons and return was sustained, the court had made an order establishing the proposed work, and approving all the assessments made, except those against the land of appellee which were set aside and vacated. This was a final judgment from which an appeal could have been taken in the original case.

When the court dismissed the petition after the work was established, the dismissal was a final judgment within the meaning of the statute. If such dismissal had been before the work was established and assessments approved, then it may be that no appeal could have been taken until after the court had established the work and approved the assessments.

It follows from what we have said, and the authorities cited, that the court erred in sustaining appellee's motion to dismiss said supplemental petition and set aside and quash said summons and return.

Judgment reversed, with instructions to overrule appellee's said motion, and for further proceedings not inconsistent with this opinion.

Smith v. State.

SMITH v. THE STATE.

[No. 19,159. Filed January 26, 1900.]

154 107
165 568

APPEAL.—*Failure to Discuss Errors Assigned.—Waiver.*—Errors not discussed by appellant in his brief are waived. p. 107.

154 107
170 131

SAME.—*Bill of Exceptions.—Instructions.*—Instructions in a criminal case can only be brought into the record by bill of exceptions. p. 107.

From the Warren Circuit Court. *Affirmed.*

J. A. Lindley and O. P. Lewis, for appellant.

W. L. Taylor, Attorney-General, J. W. Brissey, A. T. Livengood and V. E. Livengood, for State.

HADLEY, C. J.—Appellant was convicted, under §2116 Burns 1894, §2029 R. S. 1881 and Horner 1897, of aiding a prisoner to escape.

The errors assigned challenge (1) the action of the court in overruling appellant's motion to quash the affidavit and information, and (2) the overruling of his motion for a new trial. No infirmity in the affidavit and information is pointed out, and the first assignment is therefore waived under the often repeated rule of this court. *Dunn v. Dunn*, 149 Ind. 424.

As a cause for a new trial it is urged that the court erred in giving, of its own motion, instruction number three. The instructions are not in the record. We find copied into the record, but not in a bill of exceptions, what purports to be a set of instructions; but there appears no prefatory recitals of the clerk, no exceptions, no signature of court or attorney, nor any other evidence that they were the instructions given to the jury; besides, it is firmly settled by a long line of decisions that instructions in a criminal case can only be brought into the record by a bill of exceptions. *Bealer v. State*, 150 Ind. 390, and cases cited.

The only other question argued is the sufficiency of the evidence to support the verdict. The evidence is in sharp conflict. We have no power to weigh it, and hence can not disturb the judgment. Judgment affirmed.

Pritchett v. Cox.

PRITCHETT v. COX, SHERIFF.

[No. 19,214. Filed January 26, 1900.]

HABEAS CORPUS.—*Justices of the Peace.*—Where the justice of the peace before whom defendant was tried and convicted had jurisdiction of the subject-matter of the action, and of the person of the defendant, no formal error or irregularity in the proceedings of the justice would authorize the discharge of the defendant on a writ of *habeas corpus*. p. 113.

SAME.—*Sufficiency of Affidavit.*—The sufficiency of the affidavit upon which defendant was convicted cannot be raised in a *habeas corpus* proceeding. p. 113.

JUSTICES OF THE PEACE.—*Arrest of Judgment.*—*Criminal Law.*—*Habeas Corpus.*—Motions in arrest of judgment are not authorized by the act regulating criminal procedure before justices of the peace, and it cannot be urged in a *habeas corpus* proceeding that there was no judgment upon which to commit defendant because the justice of the peace sustained a motion in arrest of the judgment. p. 113.

SAME.—*Judgment.*—*Commitment of Defendant.*—*Criminal Law.*—Although it is the duty of a justice of the peace to commit a defendant to jail who does not immediately pay or replevy a fine adjudged against him, a mittimus issued 105 days after the judgment was rendered is not void. pp. 113, 114.

From the Knox Circuit Court. *Affirmed.*

S. W. Williams and Ella McCarthy, for appellant.

W. L. Taylor, Attorney-General, Merrill Moores, C. C. Hadley, B. M. Willoughby, J. M. House and W. S. Hoover, for appellee.

DOWLING, J.—This was an application for a writ of *habeas corpus*. The complaint, which was verified, stated, in substance, that the petitioner was wrongfully restrained of his liberty at the county of Knox, in the State of Indiana, by John C. Cox, the sheriff of said county; that the cause of such restraint was a commitment by one E. A. Beach, a justice of the peace of said county, upon a judgment in favor of the State of Indiana, and against the petitioner, for a fine of \$5, with costs taxed at \$27.95; that said restraint

154	108
157	178
154	108
163	467
154	108
169	666

Pritchett v. Cox.

was illegal because, (1) said petitioner had violated no criminal law of the State of Indiana; (2) because said judgment was void; (3) because said justice had sustained a motion in arrest of judgment in said cause; (4) because the affidavit on which said judgment was rendered did not state facts sufficient to constitute a violation of any criminal law of the State of Indiana; (5) because the person to whom the *mittimus* was delivered was not a qualified constable of said county, and was not authorized by law to execute the said writ; and (6) because a fee of \$10 was wrongfully taxed in favor of the "Fish Commissioner" as a part of the costs of the case.

A writ of *habeas corpus*, directed to the appellee, as sheriff of Knox county, was issued by the court, and was duly served. The officer made his return to the writ showing that the petitioner had been duly charged before a justice of the peace of the county with having in his possession a "trammel net"; that the cause was tried; that the petitioner was, by the judgment of said justice duly given, convicted of the offense charged, and was fined \$5; that it was adjudged by said justice that the petitioner be confined in the jail of said county until said fine and the costs of said action be paid or replevied, and that the petitioner had failed to pay, or replevy, said fine and costs; that the said justice, by a *mittimus*, a copy of which was filed with and made a part of said return, committed the petitioner to the county jail of said county; that said respondent, as the sheriff of said county, received the petitioner under said *mittimus* from Joseph S. Manning, a duly appointed special constable of said township, and held him in custody thereunder, and not otherwise; and that said fine and costs had not yet been paid, or replevied.

Appellant excepted to said return on the grounds that it did not state facts sufficient to show that the restraint of said petitioner was legal; that the *mittimus* referred to did not show that petitioner was charged with unlawfully hav-

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ing in his possession a "trammel net"; that the return did not show that the judgment upon which the commitment was made was yet in force; that said return did not deny the allegation of the petition that a motion in arrest of the said judgment was sustained by the said justice; that said return was insufficient in law; that said return did not deny the allegation of the petition that a portion of the costs was illegally taxed, and, that the return disclosed a delay of 105 days in issuing said *mittimus*.

The exceptions were overruled, and a reply was filed denying all the matters set forth in the return. The evidence was heard, and there was a finding that the defendant did not illegally restrain the petitioner, but that the petitioner was lawfully in his custody. Judgment was rendered upon the finding that the petitioner be remanded to the custody of the sheriff, until discharged by due process of law, and that he pay all costs of the proceeding. A motion for a new trial was overruled, and the petitioner appealed from the judgment.

Errors are assigned as follows: (1) The court erred in overruling plaintiff's exceptions to the return of the defendant to the writ of *habeas corpus* herein; (2) the court erred in its finding for the defendant herein; (3) the court erred in refusing to order the discharge of the petitioner from the custody of the defendant; (4) the court erred in rendering judgment against plaintiff (petitioner) for costs herein; (5) the court erred in overruling plaintiff's motion for a new trial.

Only two of these assignments, the first, and the fifth, are properly made, but under these all of the objections urged in the argument of counsel may be considered.

It is contended that the finding of the court was wrong, (1) because the affidavit upon which the appellant was convicted did not charge a public offense; (2) because the justice of the peace before whom the cause was tried sustained a motion in arrest of judgment, and discharged the petitioner;

and (3) because the writ of *mittimus* was not issued until the expiration of 105 days from the time the supposed judgment was rendered.

The evidence is set out in the bill of exceptions, showing the proceedings before the justice of the peace, and a judgment, regular in form, in favor of the State of Indiana, and against the appellant, for a fine of \$5, and the costs of the action, and that the appellant stand committed until the fine and costs be paid or replevied. The date of the judgment is September 22, 1899. It also appears that, on the 6th day of January, 1900, a *mittimus*, in due form, was issued to a constable specially appointed by the justice, and that the appellant was arrested upon this writ, and committed to the jail of Knox county. The transcript of the justice, which was given in evidence, shows that after the judgment had been entered and signed, a motion in arrest of judgment was made and sustained. A witness was permitted to testify that the ruling on the motion in arrest was made before the announcement or entry of the judgment. The justice of the peace swore that it was not made until afterwards.

It is provided by the statute that no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him, when the term of commitment has not expired, upon any process issued on any final judgment of a court of competent jurisdiction. §1133 Burns 1894.

The charge against the appellant, as set forth in the affidavit filed before the justice of the peace, was a violation of the following provision of the act of 1899, known as the Fish Law: "Section 10. It is hereby declared a misdemeanor for any person to have in his possession any dip net, gill net, pond net or other kind of net, trap, or seine other than allowed in sections three (3) and seven (7) of this act, and any one convicted of having such gill net, dip net, pond net or other kind of net, trap or seine in his possession

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shall be fined not less than five dollars, nor more than two hundred dollars for each offense, to which may be added imprisonment in the county jail for any determined period, and every day's possession of such gill net, dip net, or other kind of net, trap, or seine shall constitute a separate and distinct offense under this act." Acts 1899, p. 197.

The jurisdiction of justices of the peace in criminal cases is conferred and defined by the statute in these terms: "The jurisdiction of justices of the peace in criminal cases shall be coextensive with their respective counties, and they shall have exclusive original jurisdiction in all cases where the fine assessed cannot exceed three dollars, and concurrent jurisdiction with the criminal court and circuit court to try and determine all cases of misdemeanor punishable by fine only; and in trials before justices, fines to the extent of twenty-five dollars, with costs, may be assessed; and they shall have jurisdiction to make examination in all cases; but they shall have no power to adjudge imprisonment as a part of their sentence, except in the manner specially provided in this act." §1706 Burns 1894.

The further provisions of the statute relative to the power of justices of the peace to adjudge imprisonment as a part of their sentence are these: "Whenever judgment shall be rendered for a fine, it shall be a part of such judgment that the defendant stand committed until such fine be paid or replevied. And the defendant may replevy such judgment for ninety days, in the same manner as in civil cases. * * *

"If such defendant do not immediately pay or replevy the same, the justice shall commit him to jail, there to remain one day for each dollar of such fine and costs so adjudged against him." §§1715, 1716 Burns 1894.

It is held that under these sections justices of the peace have jurisdiction to assess the punishment by a fine, where the punishment may be by fine only, or by fine with discretion to add imprisonment. *Miller v. State*, 72 Ind. 421; *State v. Wolever*, 127 Ind. 306.

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The justice of the peace before whom the appellant was tried and convicted had jurisdiction of the subject-matter of the action and of the person of the appellant, and no formal error or irregularity in the proceedings of the justice would authorize the discharge of the appellant on a writ of *habeas corpus*. No question as to the sufficiency of the affidavit could be raised in that proceeding. *Willis v. Bayles*, 105 Ind. 363; *McLaughlin v. Etchison*, 127 Ind. 474; *Holderman v. Thompson*, 105 Ind. 112; *Lowery v. Howard*, 103 Ind. 440. The judgment rendered against appellant was valid, and the only means by which he could obtain relief from it was by appeal.

The objection that the justice of the peace sustained a motion in arrest of judgment is without merit. The transcript of the record of the proceedings before the justice shows that the motion in arrest was not made until after the judgment had been rendered, and the record is conclusive upon this point. If a motion in arrest could be considered in a criminal case before a justice, such motion must necessarily precede the judgment. But no such practice is authorized by the act regulating criminal procedure before justices of the peace. After a finding of guilty, the justice could do nothing but render judgment on the finding. *Moore v. State*, 72 Ind. 358; *Steel v. Williams*, 13 Ind. 73; *Friedline v. State*, 93 Ind. 366.

Sections 1912, 1913 Burns 1894, in reference to motions in arrest of judgment apply only to the procedure in the criminal and circuit courts, and have no reference to the practice before justices of the peace. *Johns v. State*, 104 Ind. 557.

In the last place, the appellant insists that the *mittimus* was void on account of the failure of the justice to issue it immediately, or within a reasonable time. It is said in *McLaughlin v. Etchison*, 127 Ind. 474, that, while it is the duty of the justice of the peace, if a defendant in a criminal case does not immediately pay or replevy a fine

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adjudged against him, to commit him to jail, yet there is no reason known to the court why he may not do so thereafter. The court say: "We think he may. Nor do we think a defendant is in a situation to complain, either of the negligence of the justice or of the indulgence extended to him in giving him time without bail for the payment of money which is immediately due.

"Appellant complains that the justice, by allowing him to go, misled him, and induced him to believe no effort would be made to enforce the judgment, and that for this reason he did not appeal within the time limited by law. If this was the motive which led the justice to delay issuing the *mittimus*, it was of course very reprehensible, but cannot affect the question before us."

After a careful examination of all the questions presented by counsel for appellant, we are satisfied that there is no error in the proceedings of the Knox Circuit Court in this cause.

Judgment affirmed.

SAUNTMAN ET AL. v. MAXWELL ET AL.

[No. 18,818. Filed June 27, 1899. Rehearing denied Jan. 26, 1900.]

DRAINS.—*Drainage Law of 1889.*—*Constitutional Law.*—The drainage act of 1885 as amended in 1889 (Acts 1889, p. 285) is not void for uncertainty as violative of the provision of §20, article 4 of the Constitution that "Every act and joint resolution shall be plainly worded, avoiding as far as practicable the use of technical terms." p. 119.

SAME.—*Drainage Law of 1889.*—*Construction.*—The act of 1889 (Acts 1889, p. 285) amending the drainage law of 1885 was intended to apply to the drainage of country lands where no outlet was available without extraordinary labor and expense, except through the corporate limits of a city. p. 119.

SAME.—*Jurisdiction of Circuit Court.*—*Drainage Law of 1889.*—The legislature may give circuit courts jurisdiction over the matter of drainage in country and city conjointly, although previous exclusive jurisdiction was granted the common council over drainage within the corporate limits of cities. p. 120.

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DRAINS.—Jurisdiction.—Drainage Law of 1889.—If the object of straightening a water course is to prevent the banks from washing, to protect a highway, to avoid the construction of a bridge, or the like, the boards of county commissioners have exclusive jurisdiction; but if the object is the drainage of wet lands, and the improvement of the water course is merely a means to that end, the circuit court has jurisdiction under the drainage act of 1889. *p. 120.*

SAME.—Petition.—Jurisdiction.—Drainage Law of 1889.—A petition for drainage averring that numerous bodies of land, particularly described, will be benefited by the proposed drainage, that many highways and streets will be improved and benefited by the proposed drainage, that the public health will be promoted, and that the proposed results can most readily be accomplished by straightening and deepening the river and constructing lateral drains, and that construction of the drain is impracticable except by going through the corporate limits of a certain city, is sufficient, under the drainage law of 1889, without alleging the particular circumstances by reason of which the proposed drainage could not be accomplished without extraordinary labor and expense and in the best and cheapest manner, except by passing through the corporate limits of a city. *pp. 120, 121.*

SAME.—Remonstrance.—Drainage Law of 1889.—Section two of the act of 1889 amending the drainage law of 1885, providing that a drainage petition shall be dismissed if two-thirds of the landowners remonstrate, does not repeal the proviso of section three of the original act that the remonstrants shall be resident landowners, but operates merely as an exception to the rule laid down in section three of the original act, and is applicable to a proceeding for drainage by country and city conjointly. *pp. 121, 122.*

SAME.—Remonstrance.—Drainage Law of 1889.—There is no warrant to act under amended section two of the drainage law of 1885 as amended in 1889, providing that a drainage petition shall be dismissed if two-thirds of the landowners remonstrate, unless the court finds that the drainage cannot be accomplished without extraordinary labor and expense, and in the best and cheapest manner, except by passing through a city. *p. 122.*

SAME.—Remonstrance.—Dismissal of Proceeding.—The necessity for the drainage of country lands by means of a drain passing through the corporate limits of a city is a jurisdictional fact to be found by the court, and the dismissal of a drainage petition on a remonstrance signed by two-thirds of the resident owners, but less than two-thirds of all landowners affected, is equivalent to a finding that such necessity does not exist, and is not reviewable. *pp. 121-123.*

SAME.—Remonstrance.—Grounds of Objection.—As no grounds need be stated in a remonstrance against the construction of a drain under the act of 1885 as amended in 1889, several papers stating different

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objections to the proposed drain, signed by remonstrators, may be put together, and all of the headings but one stricken out, and presented as one remonstrance. *p. 123.*

DRAINS.—Remonstrance.—A remonstrance against the construction of a drain under the act of 1885 as amended in 1889 is not a pleading, and need not state facts sufficient to constitute a defense to the petition. *p. 123.*

SAME.—Remonstrance.—Withdrawal of Remonstrant.—Under the drainage law of 1885 as amended in 1889 (Acts 1889, page 285) a period of ten days after the docketing of the cause is allowed for the filing of a remonstrance for the dismissal of the petition, and after the ten days have elapsed, the question for determination is whether or not the required number of landowners with proper qualifications were remonstrants at the expiration of the ten days' period, and no remonstrant can subsequently withdraw. *p. 124.*

EVIDENCE.—Offer to Prove.—Available error cannot be predicated on the action of the court in refusing an offer to prove certain alleged facts, where the witness was not produced. *pp. 124, 125.*

SAME.—Expert Witness.—The opinion of an expert witness as to whether a proposed drain could be accomplished without extraordinary labor and expense, without passing through the corporate limits of a city, must be based upon facts either admitted to be true, or assumed, or previously testified to by the witness. *p. 126.*

SAME.—Costs.—Dismissal of Petition.—Remonstrants to a proposed drain are bound to testify in their own behalf without being subpoenaed, and the costs of the sheriff in serving subpoenas upon them issued on the precept of the remonstrants, should not be taxed against the petitioners on the dismissal of the petition at the cost of petitioners. *p. 126.*

From the Jay Circuit Court. *Affirmed.*

W. H. Williamson, S. A. D. Whipple, A. C. Harris and J. R. Wilson, for appellants.

D. T. Taylor and O. H. Adair, for appellees.

BAKER, J.—On September 10, 1896, appellants filed a petition for drainage under the act of 1885 as amended in 1889. Acts 1885, p. 129; Acts 1889, p. 285, §5622 *et seq.* Burns 1894, §4273 *et seq.* Horner 1897. The proposed drain would affect about 100,000 acres in Jay and Blackford counties and would pass through the corporate limits of the city of Portland. The method to be employed was the straightening and deepening of the Salamonie river.

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The petition named 2,763 persons whose lands would be affected, of whom 533 were nonresidents. Demurrer on the grounds that the court did not have jurisdiction of the subject-matter and that the petition did not state sufficient facts was overruled. On this, cross-error is assigned. Appellees filed a remonstrance signed by 1,499 landowners named in the petition and 186 who were admitted as parties. Appellants' motion to strike out this remonstrance was overruled. The court refused to allow appellants to file a verified pleading attacking the sufficiency of the remonstrance. The issues made by the petition and remonstrance were tried by the court and, upon proper request, a special finding of facts was made and conclusions of law were stated thereon. Appellants excepted to the conclusions of law. Judgment dismissing the petition was rendered. Appellants' motions for a *venire de novo* and for a new trial were overruled.

The determination of the questions presented depends mainly upon the meaning of section two as amended in 1889 and section three of the drainage act of 1885. Section two directs how and by whom the petition is to be made. Section three provides for filing the petition in the clerk's office, for giving notice, for docketing the cause after notice thereof, for the allowance of ten days after docketing in which landowners may object to the form of the petition and the competency of the drainage commissioners, and for a hearing of such objections at the end of the ten days. Next follows this proviso: "Provided, that if at this stage of the proceedings [within ten days after the cause is docketed] two-thirds in number of the landowners named as such in such petition, resident in the county or counties where the lands affected are situated, shall remonstrate in writing against the construction of such drain or ditch, such petition shall be dismissed at the cost of the petitioner." The part of section two, as adopted in 1885, necessary for consideration, reads: "Whenever any owner or owners of any separate and distinct tract or tracts of land which would be

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Appellees also contend that it was beyond the power of the legislature to give circuit courts jurisdiction over drains that would extend through cities. The previous exclusive jurisdiction of the common council over drainage within the corporate limits was granted by the legislature. That grant was subject to withdrawal or modification. Moreover, the matter of drainage in country and city conjointly never was within the jurisdiction of common councils. It was a new subject-matter, an exceptional situation that the legislature of 1889 discovered was not provided for by then existing statutes. It was within the legislature's discretion to lodge jurisdiction of this new matter where it saw fit.

Appellees insist that the court did not have jurisdiction because the petition disclosed that a river was to be improved, straightened and deepened. If the object of straightening a water course is to prevent the banks from washing, to protect a highway, to avoid the construction of a bridge, or the like, it is decided that the boards of county commissioners have exclusive jurisdiction. *Scruggs v. Reese*, 128 Ind. 399. But if the object is the drainage of wet lands and the improvement of the water course is merely a means to that end, the drainage act of 1885 gives the necessary power to the circuit courts. *Lipes v. Hand*, 104 Ind. 503. The petition avers that numerous bodies of land, particularly described, will be benefited by the proposed drainage; that many highways and streets will be improved; that the public health will be promoted; and that the proposed results can most readily be accomplished by straightening and deepening the river and constructing lateral drains.

Appellees, in support of their demurrer on the ground that the petition does not state sufficient facts, argue that the petitioners should have alleged the particular circumstances by reason of which the proposed drainage could not be accomplished, without extraordinary labor and expense and in the best and cheapest manner, except by passing through the corporate limits of Portland. The averments

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that public health will be promoted, highways improved, lands benefited, and that construction is impracticable except by going through the limits of the city, are averments of fact. To set out the circumstances that would prove these allegations to be true, would be pleading evidence.

The main contention of appellants is that the conclusion of law on the special finding is wrong. The court found that 2,763 landowners named in the petition were before the court; that 733 of these were nonresidents of Jay and Blackford counties; that of the 2,030 residents 1,639 were remonstrants against the improvement. As a conclusion of law the court stated that the petition ought to be dismissed. There was no finding that the lands of the petitioners, who were and had to be owners of lands lying outside the limits of Portland, could not be drained, without extraordinary labor and expense and in the best and cheapest manner, except by putting the drain through the city. It is manifest that the court, in determining the sufficiency of the remonstrance, acted under the provisions of section three of the act of 1885. The claim of appellants is that the sufficiency of the remonstrance should have been determined by the proviso added to section two by the amendatory act of 1889. Prior to 1889 the proviso in section three governed all cases that could be brought under the act of 1885. The proviso added to section two in 1889 does not repeal the proviso in section three; it operates merely as an exception to the general rule laid down in section three. Section three provides for a dismissal of the petition if two-thirds of the resident landowners remonstrate. Amended section two requires a dismissal only in case the improvement is opposed by two-thirds of the landowners, without regard to residence, who own or represent two-thirds of the lands affected. Why the legislature thought this distinction proper or necessary is beyond the province of judicial inquiry. But it was incumbent upon the petitioners to prove to the court that their case came within the exception. If the remonstrance pro-

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vided for in section three or in amended section two is overruled, the matter of the proposed drainage is referred to the drainage commissioners, and landowners thereafter are not permitted to make objections to the proceedings except upon the grounds of remonstrance to the report of the drainage commissioners prescribed in section four. The court must act upon the remonstrance for dismissal before the petition is referred to the drainage commissioners. In so acting, the court necessarily decides whether the sufficiency of the remonstrance is to be determined by section three or amended section two. There is no warrant to act under amended section two unless the court finds that the drainage can not be accomplished, without extraordinary labor and expense and in the best and cheapest manner, except by passing through the city. The cases of *Anderson v. Baker*, 98 Ind. 587; *Heick v. Voight*, 110 Ind. 279; *Zigler v. Menges*, 121 Ind. 99, *Chandler v. Beal*, 132 Ind. 596; *Bonfoy v. Goar*, 140 Ind. 292, and *Wilson v. Talley*, 144 Ind. 74, to the effect that the question as to what route is best and cheapest is wholly within the judgment of the drainage commissioners and can not in the absence of fraud be litigated on remonstrances against their report, apply merely to the special location of the drain that has been described in general terms in the petition. Manifestly it is not within the discretion of the drainage commissioners to locate specifically a drain other than the one generally described in the petition. If a drain wholly in the country were petitioned for, it would be without the purview of the amendatory act of 1889; it would be a subject-matter fully covered by the act of 1885 as originally passed; and the report of the drainage commissioners and the judgment of the court confirming the report, establishing a drain through a city, would be void for want of jurisdiction over the subject-matter. *Anderson v. Endicutt*, 101 Ind. 539. That a necessity exists for the drainage of country lands by means of a drain passing through the corporate limits of a city, is a jurisdic-

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tional fact to be established by the petitioners; and, as the method of determination of the sufficiency of the remonstrance for dismissal depends upon the existence of the necessity, that jurisdictional fact must be shown on the hearing of the remonstrance. For the lack of such a finding, the conclusion of law is unassailable.

Appellants urge that the court erred in refusing to permit them to file a verified plea in abatement of the remonstrance. The plea shows that several papers, stating at the head different objections to the proposed drain, were circulated among the remonstrants; that these papers were put together by some unknown person and all of the headings stricken out but one, thereby causing without authority all the remonstrants except those signing the one paper to subscribe to grounds of objection other than those stated at the head of the papers they signed. As no grounds of objection need be stated in this sort of a remonstrance, the striking out of particular grounds by some unauthorized person was immaterial. The persons that had charge of the papers had authority to put them together and file them.

The court overruled appellants' motion to reject the remonstrance. This motion was designed to test the sufficiency of the remonstrance as a pleading. Properly, it was not a pleading. It did not need to state facts sufficient to constitute a defense to the petition. If the required number of landowners, with proper qualifications, "shall remonstrate in writing against the construction of such drain or ditch, such petition shall be dismissed." Simply that they do not want the drain is enough. That the required number, with proper qualifications, have signed the remonstrance is to be determined by proof. This remonstrance against a proposed drain is similar to the remonstrance against the granting of a liquor license that may be filed "by a majority of the legal voters of the township or ward". In *Head v. Doehleman*, 148 Ind. 145, it was decided that the remonstrance need not aver that the

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signers were voters, or a majority of the voters, and that a remonstrance stating merely the opposition of the signers to the granting of the license is sufficient.

Several months after the remonstrance was filed and at the time it was being heard, appellants' offer to file the withdrawal of 190 remonstrants was refused. A period of ten days after the docketing of the cause is allowed in which to file a remonstrance for dismissal of the petition. Within that time any remonstrant has the right to withdraw whether the remonstrance has been filed or not. After the ten days have elapsed, the question for determination on the petition and remonstrance, no matter how long the delay before the hearing is had, is whether or not the required number of landowners, with proper qualifications, were remonstrants at the expiration of the ten days period. No remonstrant may withdraw subsequently. *State v. Gerhardt*, 145 Ind. 439; *Conwell v. Overmeyer*, 145 Ind. 698; *White v. Prifogle*, 146 Ind. 64; *Sutherland v. McKinney*, 146 Ind. 611.

Appellants next complain of the action of the court in permitting 186 persons, not named in the petition, to file their remonstrance without first making application to be admitted as parties. The court treated the presentation of their remonstrance as an application in itself to be admitted as parties, and the petition was amended, at the suggestion of counsel for the petitioners, by adding the 186 names as owners of lands affected by the proposed drain. This assignment discloses at most a bare informality.

A witness for appellants, after testifying that one Votaw in May, 1896, died the owner of lands described in the petition and left children surviving him, was asked and not permitted to answer this question: "Give the names of the children or heirs that Jonas Votaw left at the time of his death." Thereupon counsel for petitioners stated to the court that Votaw was named in the petition as owner of lands affected; that he died before the filing thereof; that the tax duplicate shows the title of the lands to be now in

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the name of Jonas Votaw; that he left (eight persons named) as his heirs; that two had signed remonstrances and had been admitted as parties; that the petitioners will ask that the other heirs be substituted for Jonas Votaw and counted for the drain; that they will show by other witnesses that more than 100 other persons named in the petition died before the filing thereof and left 500 heirs who had not signed remonstrances and ought to be counted for the drain. On the refusal of this offer appellants predicate their argument that the court wronged them in not taking into account all of the heirs of deceased persons who had been named in the petition. The question discussed is not presented by the record. The "other witnesses" were not produced. There was no error in refusing the offer as to what could have been shown by them. *Judy v. Citizen*, 101 Ind. 18; *Kern v. Bridwell*, 119 Ind. 226; Elliott's Appellate Procedure, §743, and cases cited. It was not harmful to reject counsel's statement that "they will ask that the other heirs of Votaw be substituted for him." The court could not rule upon the proposed application until it was made. The offers regarding the contents of the tax duplicate and all other matters except the names of Votaw's children or heirs were not responsive to the question, and error can not be based on their rejection. *Deal v. State*, 140 Ind. 354, 371. If that part of the offer which was called for by the question had been allowed, the evidence of the names of Votaw's children or heirs would not have presented the point that is urged. The tax duplicate was not offered. Votaw died in May, 1896, and the petition was filed in the following September. Did Votaw die testate or intestate? Had the children or heirs in question ever any interest in lands described in the petition? Had they parted with their interest before the petition was filed? In regard to these and other matters that might be suggested no questions were asked and offers to prove made while any witness was on the stand.

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It was proper for appellants to prove by experts, or by others who were qualified to give an opinion on the subject, that the proposed drainage could not be accomplished, without extraordinary labor and expense and in the best and cheapest manner, except by passing through the corporate limits of Portland. A witness, after testifying to some topographical facts, was asked whether or not in his opinion the proposed drainage could be accomplished, without extraordinary labor, etc., except by passing through the city. If the witness had been permitted to answer the question as asked, the answer would have been an opinion irrespective of any basis therefor. On a direct issue to be determined by the trier of the cause, it is not the general opinion of a witness that is to be listened to,—it is his opinion in connection with the facts on which the opinion is founded. Otherwise, there would be no means of weighing opinion testimony. The opinion must be asked for upon certain facts, either admitted to be true, or assumed, or previously testified to by the witness. The question must explicitly call for a conclusion from facts, not a mere general opinion. *Rush v. Megee*, 36 Ind. 69; *Bishop v. Spinning*, 38 Ind. 143; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Burns v. Barenfield*, 84 Ind. 43; *Elliott v. Russell*, 92 Ind. 526; *Craig v. Noblesville, etc., Co.*, 98 Ind. 109; *Deig v. Morehead*, 110 Ind. 451; *Bedford R. Co. v. Palmer*, 16 Ind. App. 17.

The court taxed against appellees certain costs of the sheriff for serving subpoenas upon remonstrants, issued on the precept of the remonstrants, and witness fees claimed by remonstrants. They were bound to testify in their own behalf without being subpoenaed. They could not run up these costs against the petitioners. *Goodwin v. Smith*, 68 Ind. 301; *Reader v. Smith*, 88 Ind. 440.

Judgment affirmed.

Monks, J., did not participate in this decision.

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GREEN ET AL. v. HEASTON, RECEIVER.

[No. 18,582. Filed January 31, 1900.]

COURTS.—*Removal of Cause to Federal Court.—Sufficiency of Petition.*—A petition for the removal of a cause from a state to a federal court on the ground of diverse citizenship alleging diverse "residence" of the parties "at the time of filing the complaint," instead of alleging diverse citizenship at the time of the commencement of the action, and also at the time the petition was filed, is insufficient where diverse citizenship of the parties is not shown by the pleadings. pp. 128-130.

APPEAL.—*Joint Assignment of Error.—When not Available.*—Where there is a joint assignment of errors by two or more appellants challenging the correctness of one or more rulings of the trial court, the error or errors, if any, in said ruling or rulings, must be joint against all the appellants joining in the assignment, or the same will not be available. p. 130.

SAME.—*Failure of Appellant to Comply with Rules of Supreme Court Requiring Paging of Record.*—Appellant waives his right to have questions considered on appeal which depend for their determination upon the evidence, where he fails to comply with rules twenty-six and thirty-one, requiring that the lines of the transcript be numbered, and that the transcript be referred to by page and line in briefs. p. 131.

From the Huntington Circuit Court. *Affirmed.*

M. L. Spencer, W. A. Branyan, H. B. Sayler, J. M. Sayler, J. E. Hessin and W. H. Hessin, for appellants.
J. B. Kenner and U. S. Lesh, for appellee.

MONKS, J.—The Huntington Bagging Company, one of the appellants, a corporation organized under the laws of this State, and engaged in business at Huntington, Indiana, conveyed certain real estate to John E. Hessin, who conveyed the said real estate to George S. Murphy, who conveyed the same to George S. Green. This action was brought by appellee against all of said parties to set aside said conveyances of said real estate, and subject the same to sale to pay the indebtedness of said corporation, on the ground that the conveyance to Hessin was fraudulent as to the creditors

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of said corporation, and that Murphy and Green each received the conveyance made to him with full notice and knowledge thereof. Appellants Green, Murphy, and Hessin, before the time they were required to answer or plead to the complaint, filed a petition to remove said cause to the circuit court of the United States for the district of Indiana. They filed with said petition a bond which was approved by the court. This petition was overruled. The cause was tried by the court, and a finding made, and judgment rendered in favor of appellee, setting aside said conveyances as fraudulent.

It is insisted by appellants Green, Murphy, and Hessin that the court erred in overruling their petition for the removal of said cause to the circuit court of the United States for the district of Indiana, and that the proceedings of the trial court, after said petition and bond were filed, were without jurisdiction, and therefore void.

The rule is that unless, from the petition and other matters properly in the record when the petition and bond are filed, the facts showing jurisdiction in the federal court appear, the State court is not bound or authorized to surrender its jurisdiction. Therefore, unless the facts exhibited by such record entitle the party to such removal, the jurisdiction remains in the State court. *Power v. Chesapeake, etc., R. Co.*, 18 Sup. Ct. 264, 267, 42 L. ed. 673; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. ed. 144; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. ed. 249; *Merchants, etc., Co. v. Insurance Co.*, 14 Sup. Ct. 367, 38 L. ed. 195; *Gage v. Carraher*, 14 Sup. Ct. 1190, 25 L. ed. 989; *Meyer v. Construction Co.*, 100 U. S. 457, 25 L. ed. 593; *Brown v. Trousdale*, 11 Sup. Ct. 308, 35 L. ed. 987; *Darton v. Sperry*, 71 Conn. 339, 41 Atl. 1052.

The facts stated in the petition for removal, other than the amount in controversy, are that the plaintiff is now, and was at the time of filing the complaint, a resident of the State of Indiana; and the defendants, said petitioners, George S.

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Green, George S. Murphy, and John C. Hessin, were at the time of filing of the complaint, and are now, each and every one of them, residents of the state of Kansas. It is essential to the right of removal of a cause from a state to a federal court, on the ground of diverse citizenship, that all the defendants shall be citizens of different states from the plaintiff, or that the case be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other side, which can be fully determined without the presence of any of the other parties to the suit as it has been begun. *Fletcher v. Hamlet*, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. ed. 679; *Fraser v. Jenkinson*, 106 U. S. 191, 194, 1 Sup. Ct. 171, 27 L. ed. 131; *First Nat. Bank v. Prager*, 91 Fed. 689, 34 C. C. A. 51; *Stuart v. Bank of Staplehurst*, 57 Neb. 569, 78 N. W. 298.

The petition for removal must state the facts which warrant the removal, and give the circuit court jurisdiction. *Railway Co. v. Ramsey*, 22 Wall. 322, 22 L. ed. 823; *Grace v. American, etc., Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. ed. 932. The jurisdictional facts must be stated specifically, and a general allegation in the language of the statute is not sufficient. *Gold, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. ed. 992.

When the right to remove is claimed, as in this case, upon a difference in citizenship, the citizenship of each party should be alleged, and it is not sufficient to state their residence. *Neel v. Pennsylvania Co.*, 157 U. S. 153, 15 Sup. Ct. 589, 39 L. ed. 654; *Grace v. American, etc., Ins. Co.*, 109 U. S. 278, 283, 284; *Amory v. Amory*, 95 U. S. 186, 24 L. ed. 428; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 388; 4 Sup. Ct. 510, 28 L. ed. 462; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

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It must be alleged that the difference in citizenship existed both at the time of the commencement of the action, and when the application for removal is made. *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. ed. 249; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. ed. 914; *Akers v. Akers*, 117 U. S. 197, 6 Sup. Ct. 669, 29 L. ed. 888; *Houston, etc., R. Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. ed. 455; *Gibson v. Bruce*, 108 U. S. 561, 2 Sup. Ct. 873, 27 L. ed. 825. If, however, both of said facts are alleged with sufficient certainty in the pleadings, they need not be again stated in the petition. *Bondurant v. Watson*, 103 U. S. 281, 26 L. ed. 447; *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87.

Neither the citizenship of the parties nor of any one or more of them is alleged in the pleadings in this case, or in said petition. As the petition only stated the difference in residence, it is evident that the court did not err in denying the petition for removal, for the reason that said facts did not give the circuit court of the United States jurisdiction of said action. Black's *Dillon on Removal of Causes*, §§171, 172, 173. The jurisdiction to try and determine said cause was, and therefore remained, in the court below, and its proceedings and judgment were not void.

Appellants severally moved the court for a new trial, and severally excepted to the action of the court in refusing to grant a new trial. Appellants jointly assigned errors in this court. Appellee insists that the assignment of errors being joint does not question the correctness of the court's ruling on the several motions of appellants for a new trial; that where there is a joint assignment of error by two or more appellants, challenging the correctness of one or more rulings of the trial court, the error or errors, if any, in said ruling, or rulings, must be joint against all the appellants joining in the assignment, or the same will not be available. This contention of appellee is sustained by the authorities. *Grimes v. Grimes*, 141 Ind. 480, 481; *Louisville, etc., R. Co. v.*

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Smoot, 135 Ind. 220; *Sparklin v. Wardens, etc.*, 119 Ind. 535. As was said in *Grimes v. Grimes, supra*, "All errors assigned are joint, and the error, if any, must be joint to be available."

Appellee urges that we could not consider any question presented by the causes assigned for a new trial, even if errors were properly assigned, for the reason that appellants have failed to comply with rules twenty-six and thirty-one of this court. We concur in this contention of appellee. The questions presented by the causes assigned for a new trial depend for their determination upon the evidence. The above mentioned rules require that the lines on each page of the transcript be numbered, and that the briefs shall refer to the transcript by page and line. The lines in the bill of exceptions containing the evidence are not numbered on any page thereof, as required by rule thirty-one, and the briefs do not and can not refer to the transcript by line, as required by rule twenty-six. Appellee in his brief filed July 28, 1898, called attention to the failure of appellants to comply with said rules, and objected to the consideration of any question depending for its determination upon the evidence. Appellants have taken no steps to comply with said rules. Judgment affirmed.

THE STATE OF INDIANA v. STYNER.

[No. 19,088. Filed January 31, 1900.]

CRIMINAL LAW.—False Pretenses.—Larceny.—Indictment.—An indictment for obtaining property by false pretenses is not rendered bad by facts averred therein showing larceny, since different offenses may spring from the same act. *pp. 133, 134.*

SAME.—False Pretenses.—Larceny.—Indictment.—An indictment charging that defendant by falsely representing to the prosecuting witness that he would deposit a bank check of \$1,000 in her name, and that he intended to marry her and had provided a house for them to live in as husband and wife, obtained her signature to a check for \$725, sufficiently charges that the property was obtained by false pretenses, within the meaning of §2204 Horner 1897,

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although the prosecuting witness believed she was signing and delivering a check for \$125 instead of \$725. pp. 134-137.

CRIMINAL LAW.—*Gift Induced by False Pretenses*.—One obtaining a gift by false pretenses may be prosecuted therefor, under §2204 Horner 1897. p. 137.

From the Tippecanoe Circuit Court. *Reversed*.

W. L. Taylor, Attorney-General, C. E. Thompson and D. E. Storms, for State.

J. F. Hanly and W. R. Wood, for appellee.

HADLEY, C. J.—Indictment for obtaining property under false pretenses. Motion to quash the indictment sustained, and the State appeals.

Omitting formal parts, the indictment, in substance, charges: That the defendant, Harry N. Styner, on the 15th day of March, 1899, at Tippecanoe county, did, then and there, feloniously and knowingly, falsely pretend and represent to Alice Lightle, with intent to cheat and defraud her (Lightle), and for the purpose of obtaining from her the property hereinafter named, that he, Styner, had a bank check for \$1,000, executed to him by his father, which he intended to deposit in the First National Bank of Lafayette in the said Lightle's name; and in support of which representations Styner presented to Lightle, for her inspection, what purported to be a bank check for \$1,000, executed by his father; and Styner did, then and there, further feloniously, etc., represent and pretend to her, the said Alice Lightle, that he intended to marry her, and that he had provided a house for them to live in as husband and wife; and did further, then and there, feloniously, etc., represent and pretend to her that a certain unsigned bank check, bearing an uncanceled revenue stamp, which he then and there had and presented to her for her examination, was a check for \$125 on the First National Bank of Lafayette; while, in truth, it was an unsigned check for \$725, a copy of which check is set out; that she, the said Lightle, relying upon said representations, and believing them to be true, and having

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no means of ascertaining the contrary, and having unbounded confidence in Styner, did, upon Styner's request, and being induced thereto by said false representations, sign her name to the check so represented by Styner to be for \$125; and, being further induced by said false representations, did place the check, after signing, in Styner's possession, with the intention and purpose of making him a present of \$125; that the check so signed was her property, and of the value of \$725; and that by means of said false representations, Styner obtained from Lightle her signature, bank check, and property; that, in truth, Styner had no bank check, executed by his father, for \$1,000, or for any other sum, and he knew the check he presented to Lightle and requested her to sign and which was signed by her, was for \$725 and not for \$125; that Styner did not intend to marry Lightle and had not provided a home for them to live in as husband and wife; and that, induced by the false representations, Lightle canceled the revenue stamp upon the check, after signing it upon Styner's request, and handed the check so signed to Styner; and that Styner, after receiving the same, indorsed his name on the reverse side.

The points made against the indictment are (1) that the facts averred constitute larceny and not false pretense; (2) the signed check was the property obtained, and it can not be separated; (3) the title to the property was not parted with by the delivery averred; (4) a gift can not be the subject of a false pretense; (5) the alleged false pretenses were not the operative cause for parting with the check.

The first three points are so closely blended that they will be considered together. As to the first, it does not follow that, because the facts averred exhibit a case of larceny, they do not also show a sufficient charge for obtaining property by false pretenses. There are many acts that offend against more than one of our criminal statutes. Larceny and robbery, assault and battery, assault and battery with intent to kill, assault and battery and an affray, are different

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offenses that may spring from the same act. So, also, a sale of intoxicating liquors, without a license, to a minor on Sunday, while but a single act, may constitute three several and distinct offenses. *State v. Gopen*, 17 Ind. App. 524. So, also, a count for larceny may be joined with a count for obtaining the same goods by false pretenses or for obtaining the same goods by robbery, by burglary, by embezzlement, or for receiving, knowing it to have been stolen. §1817 Burns 1894, §1748 R. S. 1881 and Horner 1897.

The question, therefore, is: Do the facts pleaded constitute a sufficient charge of obtaining the property of the prosecuting witness by false pretenses? The principal distinction between the tortious taking of the property of another by false pretenses, and by such active fraud as constitutes larceny, is, that in the former the owner voluntarily and intentionally parts with the possession and title of his property, being induced thereto by the false pretenses and deception of the defendant, while in the latter he ignorantly and unintentionally parts with the possession, but not with the title, it being essential to the transfer of title that the act be accompanied with knowledge and intention.

It will be observed that the indictment charges, in effect, that the false representations and pretenses were made for the purpose of inducing the prosecuting witness to execute and deliver a certain bank check to the defendant,—a check represented by him, and believed by her, to be for \$125, but which was in fact for \$725. From this it is argued by the defendant's counsel that, since Lightle executed and parted with but a single check, and that for \$725 (\$600 more than she intended), there was no intentional delivery of the particular check, no parting with the title thereto, and hence the act was larceny, and not false pretense; the contention being that there can be no division in the amount of the check to characterize the offense.

The charge is that Lightle believed the check was for \$125 only, and that she intended, by its execution and delivery

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to the defendant, to give him \$125. The paper was signed and delivered by her as a valid check for \$125, and, if free from fraud, would have been a valid delivery for that amount, even though the face of it called for a greater sum. A part only of a chose in action may be assigned. *Groves v. Ruby*, 24 Ind. 418; *Earnest v. Barrett*, 6 Ind. App. 371; *Fordyce v. Nelson*, 91 Ind. 447. And an assignment of part implies a delivery of part. If the indictment was for larceny, the logic of the defendant would require us to hold that it was not larceny since she purposely and intentionally delivered the check for a part of the amount called for. The test is: Did the defendant induce the prosecuting witness to sign and deliver to him the particular check by the false representations and pretenses made to her, as charged? If he did, we do not perceive why he is not guilty of obtaining her property by false pretenses, within the meaning of the statute. It would be a novel quality of justice that would grant the defendant his discharge upon his showing that, by his artful deception, he procured her to yield to him property of greater value than she intended. To illustrate: Suppose the defendant had gone to the prosecuting witness, with the false pretenses charged in the indictment, for a loan of \$125, and that, moved by that peculiar confidence that comes of betrothal, and the hope of a home of her own, she had handed him a roll of bills, and requested him to count it for himself, and that, while acting under the request, the defendant had, by dexterous manipulation, thrown the ends of the large bills back, and brought the ends of the small ones forward, so that the extended bills would count but \$125, and between them, in folds, were \$600 of other bills, and she had permitted him to take the package as containing but \$125, while in fact it contained \$725, would it be doubted that he obtained the \$125 by false pretenses? And while successfully prosecuting his false pretenses, if he embraced an opportunity to steal \$600 more, should the last iniquity entitle him to immunity from punishment for the former? We do not see why.

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In *Reg. v. Jessop*, Dears & B. C. C. 442, 7 Cox. C. C. 399, the prisoner presented to the prosecutor, who could read, a one pound note for change, telling her it was a five pound note, and the prosecutor, without reading the note, and without suspecting the falsity of the statement, gave the prisoner change as for a five pound note. Campbell, C. J., in reviewing the case, said: "We are all of opinion that the conviction was right. In many cases a person giving change would not look at the note, but, being told it was a five pound note, and asked for change, would believe the statement of the party offering the note and change it. Then if, giving faith to the false representation, the change is given, the money is obtained by false pretenses." The doctrine of this case is cited approvingly. 2 Bishop Crim. Law, §435; Clark's Crim. Law of Canada, 339.

The indictment is founded upon §2352 Burns 1894, §2204 R. S. 1881 and Horner 1897, which provides that "Whoever, with intent to defraud another, designedly, * * * by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, or the transfer of any bond, * * * draft, or check or thing of value, * * * shall be imprisoned," etc.

It is charged that the defendant, feloniously and knowingly, falsely represented to Lightle that he had a bank check his father had executed to him for \$1,000, which he intended to deposit in bank in her name; that he intended to marry her, and had procured a house for them to live in as husband and wife; that the check he requested her to sign was for \$125; that she believed these representations to be true, and was induced thereby to sign and deliver the check to the defendant, intending thereby to give him \$125. It is also averred that each of these representations was false; that he had no check for \$1,000, or any other sum, executed to him by his father; that he did not intend to marry the prosecuting witness, and had not provided a house for

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them to live in as husband and wife; and that the check was for \$725, and not for \$125.

Here we have averments that false representations concerning existing facts were knowingly and designedly made by the defendant to procure from the prosecuting witness the execution and delivery to him of a certain writing, the property of the prosecuting witness; that the effect of the false representations was to induce her to execute and deliver the writing; and this brings the case clearly within §2352 (§2204), *supra*.

As to the fourth point, it is claimed that a gift is not the subject of a false pretense. Some early cases, probably controlled by statute, hold that the statute against false pretenses operates only for the protection of trade and credit, and not against begging and benevolence. But our statute is clear, and admits of no exception, and we perceive no reason why it is less a crime to deceive another into yielding money, or other property, as a gift, than in yielding it under the pretense of trade; and so it has been held by this court. *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292. See also *State v. Matthews*, 91 N. C. 635; *Commonwealth v. Whitcomb*, 107 Mass. 486.

In the last case, under the pretense of being a clergyman in distress, the defendant obtained money relief from a minister; concerning which the court say: "But it is obvious that the case comes within the words of the statute. It comes also within the reason of the statute. There is as much reason for protecting persons who part with their money from motives of benevolence, as those who part with it from motives of self-interest."

The charge that the false pretenses concerning the \$1,000 check, the defendant's intention to marry the prosecuting witness, the already provided house for them to live in as husband and wife, and the amount of the check, induced her to sign and deliver the check sufficiently shows the

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operative cause, proof of all or any one of which would be sufficient to support the indictment.

The indictment is sufficient. Judgment reversed, and cause remanded with instructions to overrule the defendant's motion to quash the indictment.

BIRD ET AL. v. ST. JOHN'S EPISCOPAL CHURCH OF
ELKHART ET AL.

[No. 18,608. Filed February 1, 1900.]

APPEAL AND ERROR.—*Bill of Exceptions.—Certificate.—Evidence.*—

A general bill of exceptions certified by the trial judge as containing "all of the evidence offered, introduced and given in said cause to the point where the defendant rested its main case," does not show that all of the evidence was embraced in the bill of exceptions, and no question dependent upon the evidence will be considered on appeal. *pp. 140, 141.*

CONTRACTS.—*Signatures.—Special Findings.—Conclusions of Law.*—

Mechanics' Liens.—An exception to a conclusion of law that plaintiffs and others were entitled to the enforcement of mechanics' liens on a church building, on the ground that the contract to construct the building was that of the individuals who signed it, is unavailing, where the court expressly found that the contract was that of the church. *p. 146.*

SAME.—*Liquidated Damages.*—A finding and judgment of the court in an action to enforce a mechanic's lien against a church property, giving defendant a credit of \$50 per day for sixty days delay in constructing the building, provided in the contract as and for liquidated damages, will not be disturbed on appeal, where the court found that the actual damages occasioned by the delay were too uncertain to be fixed by the court, and that the amount fixed by the contract as liquidated damages was not greatly disproportionate to the loss sustained as a result of the delay. *pp. 146, 147.*

MECHANICS' LIENS.—*Foreclosure.—Counterclaims.—Attorney's Fees.*

—Where in an action by contractors to enforce mechanics' liens the court found that after the payment of liens of subcontractors and material men, and the allowance of claims of defendant on account of non-performance of the contract on the part of plaintiffs there was nothing due the plaintiffs, the payment of their claims extinguished their lien, and there was no basis for the allowance of attorney's fees. *pp. 150, 151.*

154	138
163	660
154	138
164	664
154	138
167	191

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PARTIES.—*Defect.*—An objection to a complaint that defendant was sued by the wrong name cannot be made by demurrer for want of facts. *p. 151.*

PLEADING.—*Exhibits.*—The plans and specifications referred to in a building contract were not parts of the contract in such sense as to require that they should be filed as exhibits with a complaint on the contract. *p. 152.*

SAME.—*Contracts.*—*Non-performance.*—Averments in a complaint to recover the amount due on a building contract that plaintiffs fully performed the conditions of the contract on their part, excepting the condition thereof requiring them to obtain the certificate of the supervising architect that the work was completed under the terms of the contract, and that after the work was finished they demanded the certificate, and notified defendants of their demand, requesting them to cause the certificate to be delivered, but that the same was refused, show a sufficient excuse for the failure of plaintiffs to procure the certificate. *pp. 152, 153.*

From the Elkhart Circuit Court. *Reversed.*

Dodge & Browne, for appellants.

P. L. Turner, James S. Dodge and Harmon & Barney, for appellees.

DOWLING, J.—This was an action by appellants against the rector, wardens, and vestrymen of St. John's Episcopal Church, of Elkhart, Indiana, by the name of St. John's Episcopal Church, of Elkhart, Indiana, upon a building contract, and to enforce a mechanic's lien. Divers subcontractors and material men, who claimed liens, were joined as defendants. The complaint was in a single paragraph. The principal defendant, St. John's Episcopal Church, filed an answer in four paragraphs, the *first* being a general denial, the *second* a plea of payment, the *third* a counterclaim for liquidated damages, under the contract, for failure to complete the building within the time limited, and the *fourth* a further counterclaim for special damages by reason of certain breaches of the contract by plaintiffs other than by delay. Replies in denial to second, third, and fourth paragraphs. The remaining defendants, separately, filed answers

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in denial, and alleging payment. They also filed cross-complaints, setting up their several claims as subcontractors and material men, demanding that the sums owing to them be first paid out of any moneys due to the principal contractors, and that their liens be enforced against the building and premises. Answer in denial.

At the request of the parties, the court made a special finding of facts with its conclusions of law thereon, to each of which conclusions appellants excepted. Motions for a new trial, and for judgment on the special finding, were made by appellants, and overruled. Judgment that appellants take nothing by their suit, that the several subcontractors and material men recover from appellants the amounts of their respective claims, with their attorneys' fees, and that their liens be enforced against the church property. It was further adjudged that the defendant, the rector, wardens, and vestrymen of St. John's Episcopal Church, etc., recover from the appellants \$1,972.32, subject to credits for any amount which the plaintiffs might pay thereafter to the said subcontractors and material men on account of their judgments.

Error is assigned upon the several conclusions of law, and upon the refusal of the court to grant a new trial.

Appellees make the point that the evidence is not properly in the record. This objection rests upon the form of the certificate of the trial judge to the general bill of exceptions, and, in our opinion, the objection is well taken. The certificate is in these words: "And now, on this 24th day of February, 1898, the said plaintiff presents his bill of exceptions, containing all of the evidence offered, introduced, and given in said cause *to the point where the defendant rested its main case*, and all objections and exceptions reserved during the trial of said cause *to the point where the defendant rested its main case*. Said bill of exceptions contains all of the evidence in said cause *to the point where the defendant rested*

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his main case. And now, on this 24th day of February, 1898, the Honorable Lew Vail, the special judge who tried said cause, in vacation, signs and seals said bill of exceptions etc." The certificate was signed by the special judge.

It does not appear from this certificate, or elsewhere, that the evidence set out in the bill of exceptions was all the evidence given in the cause. On the contrary, the unavoidable inference from the language of the certificate is that there was other evidence which is not included in the bill. There were several defendants, and it is impossible to determine just what is meant by the certificate. Other evidence may have been introduced by the plaintiffs below, and by other defendants, after the defendant, the church corporation, had rested its *main case*, whatever that may be, which fully sustained all the findings of facts. We are, therefore, constrained to hold that the evidence is not in the record, and, consequently, that no question dependent upon it is before us. *Harris v. Cleveland, etc., R. Co.*, 153 Ind. 475. This ruling takes out of the record all of the supposed errors except such as are assigned upon the conclusions of law.

The special finding is, in substance, as follows: The rector, wardens, and vestrymen of St. John's Episcopal Church, of Elkhart, Indiana, as a corporation, were, on June 4, 1895, the owners of the premises described in the complaint; on said day, a contract, in writing, as alleged in the complaint, was entered into between the plaintiffs and the defendant, the rector, wardens, vestrymen, etc., whereby the plaintiffs were to furnish all the materials and labor, and were to erect on the premises described a church edifice, for which the church corporation was to pay the plaintiffs \$13,850; the plaintiffs proceeded with the said work, and completed the same, agreeably to the contract, except as otherwise set forth in the special finding. After the contract had been entered into, by the mutual agreement of the parties and for the accommodation of the plaintiffs, the church

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corporation accepted a bid from the Lansing Lumber Company to furnish certain lumber and materials for said church edifice, and promised to pay for the same, such payment to be entered as a credit on the contract price for said church building. The cost of the material and work, so received from said company, was \$1,881.18, and said amount is a proper credit on said contract price. After having furnished a part of the lumber and mill work mentioned in their bid, the Lumber Company became insolvent, and were unable to furnish the residue, and by such failure the plaintiffs were greatly damaged. The plaintiffs procured the residue of the mill work from another firm, and paid for the same \$909.42; but said purchase and outlay were included in their contract, and were a part of the materials the plaintiffs were bound to furnish. Another small bill for lumber, purchased by plaintiffs, was also included in their said contract. Sundry items charged for by plaintiffs as extra work were just claims, because not embraced in the contract. Certain unimportant deviations from the contract plans and specifications were made by plaintiffs, but the same were known to and not objected to by the church corporation, and said corporation sustained no damage thereby. The facing stone above the basement, for which \$800 was charged by plaintiffs as for extra work, was not extra, but was within the contract. The tower of the church edifice settled, causing the stone steps built into it to crack, but the plaintiffs were not responsible for such settling. The mortar used in the construction of the building was not such as the contract called for, and the church corporation was damaged thereby \$100. By defective pointing of the walls, the defendant church was damaged \$150; and by various other defects in the work, the church corporation was damaged to the further amount of \$172. All of said sums should be allowed as credits upon, or as deductions from, the contract price of said church edifice. The payments made to and on

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account of the plaintiffs by the said rector, wardens and vestrymen, amounted to \$10,489.77. The plaintiffs refused to construct the reredos named in the contract, and, by the agreement of the parties, the rector, wardens, vestrymen, etc., procured the same to be constructed by other persons, at an expense of \$295, which is to be deducted from the contract price. By the terms of the contract, the church edifice was to be completed by plaintiffs by March 1, 1896, but the time was extended by the architect until April 5, 1896: the plaintiffs were delayed in their work one month by the failure of the Lausing Lumber Company, and by an accident to Laurer & Weiss, subcontractors. The plaintiffs claimed that their work, under their contract, was completed by June 5, 1896, but the officers of the church denied this, and, on June 12, 1896, made complaint, in writing, to the plaintiffs, of sundry defects and omissions in said work. The possession of said church building was, in fact, in the defendant, the church corporation, from June 5, 1896, but was held by plaintiffs at their request; afterwards, the plaintiffs endeavored to correct and make good said defects and omissions, but did not fully do so, to the damage of the church corporation as afterwards in said finding stated. On June 24, 1896, the officers of the church notified plaintiffs, in writing, that they had failed to complete the church according to their contract, that said church corporation elected under the contract to complete the same itself, and that the officers demanded the keys of the building. The building was delivered by the plaintiffs to the officers of the church, in pursuance of this notice, July 3, 1896, when the rector, wardens, etc., undertook to finish the work themselves. No final certificate was ever issued by the supervising architect stating that the work, under the contract, was finished by plaintiffs; said work was not, in fact, completed by plaintiffs. Plaintiffs are entitled upon a *quantum meruit* to a certificate from the architect showing that there is due

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them, subject to certain additions and deductions, the sum of \$3,182.45. Within sixty days after the completion of their work, the plaintiffs filed in the office of the recorder of Elkhart county notice of their intention to hold a lien on said church building and premises, as security for the payment of the sum of \$7,322.60. A reasonable fee for plaintiff's attorney, in case the plaintiffs recover, is \$500. By the terms of the contract, the church corporation had the right to retain, out of any moneys coming to the plaintiffs, a sum, or sums, sufficient to discharge all liens against said church property, which said plaintiffs ought to pay, and for which said church property might be liable; such liens to the amount of \$1,674.36 had been so filed and taken; all of said claims and liens have been fully established, and the church corporation made liable for the same; they were chargeable to the plaintiffs, and should be deducted from any amount found due to the plaintiffs. It was provided in the contract that the plaintiffs should finish their work, and have said church edifice ready for use by its owners, by March 1, 1896, and, in default thereof, the plaintiffs should pay to the owners \$50 for every day thereafter that said work remained unfinished, as and for liquidated damages. The owner, the church corporation aforesaid, performed all the conditions on its part to be performed, but the plaintiffs, after having obtained an extension of the time for finishing said work until April 5, 1896, failed to complete the same within said time, and said work remained in their hands uncompleted until June 5, 1896, making a breach of said contract to the extent of delaying said work sixty days; the actual damages for such delay are too uncertain to be fixed by the court; said contract was deliberately made, without fraud, and is the agreement of the parties; the amount fixed by said contract as liquidated damages is not greatly disproportioned to the loss sustained by the owner of said church building, as a

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result of the delay on the part of the plaintiffs in finishing the same.

As conclusions of law upon the foregoing finding of facts, the court stated in substance: (1) That the subcontractors and lienholders were entitled to recover judgment. (2) That the plaintiffs were entitled to recover on their contract, and for extra work, \$13,907, together with their attorney's fee of \$500, if they are entitled to any foreclosure of their lien, making in all \$14,407, less the payments and deductions afterwards set forth in the conclusions of law. (3) That plaintiffs are not entitled to recover \$100 for ten inches of Berea stone put in by them. (4) That the defendant church is entitled to credits and deductions to the amount of \$11,204.45. (5) That the defendant church is entitled to a credit of \$50 per day for sixty days' time, to wit, from April 5, 1896, to June 5, 1896, during which period said church building remained uncompleted, and that the provision to this effect in the contract is for liquidated damages. In the 6th, 7th, and 8th conclusions, it is held that the subcontractors and cross-complainants are entitled to recover from the plaintiffs the following sums: Martin & Amidon \$406.34, with \$35 for their attorney's fee; Laurer & Weiss, \$181.95, with \$35 for attorney's fees; Furlong & Frush, \$981.41, with \$35 for attorney's fees. It is further stated that each of these firms is entitled to a foreclosure of its lien on the church property, as described in the complaint. (9) That the amounts due the subcontractors should be deducted from the sum found due to the plaintiffs in conclusion number two. (10) That after deducting from the sum due the plaintiffs, as stated in conclusion number two, the various amounts allowed the defendant, the wardens, vestrymen, etc., as set forth, and after deducting said cross-complainants' claims, the plaintiffs should take nothing upon their complaint, but that the defendants, the wardens, vestrymen, etc., should recover from the plaintiffs \$1,972.32,

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together with their costs. (11) That, upon payment by plaintiffs of any or all of the judgments against them in favor of the subcontractors, they should be entitled to credit for the amount so paid.

The exception to the *first* conclusion of law is unavailing, for the reason that the court had expressly found that the agreement sued upon was the contract of the rector, wardens and vestrymen of St. John's Episcopal Church, of Elkhart, Indiana, and not the contract of the individuals who signed it on behalf of the church. We must look to the pleadings and findings of fact alone, and these fully support the conclusion as to the parties to the contract, and the capacity in which the persons affixing their signatures signed it.

The *second* conclusion of law is a necessary deduction from the findings of fact, and correctly states the amount the appellants should recover on their contract, and for extra work, less the payments and deductions elsewhere set forth in the other conclusions of law. The *third* conclusion is directly responsive to the facts found that the work done was within the contract, and not extra. The *fourth* conclusion is but a summary of the credits and deductions to which the church corporation is entitled, as shown by the several findings of fact. The findings, with the pleadings on which they are made, taken as the basis of this conclusion, fully sustain it.

The *fifth* conclusion of law is that the defendant, the church corporation, is entitled to a credit of \$50 per day for the space of sixty days, from April 5, 1896, to June 5, 1896, as liquidated damages on account of the failure of the appellants to complete the work, under their contract, by April 5, 1896, and their delay until June 5, 1896, in completing it.

It appears from the finding of facts, that it was provided in the contract that appellants should finish their work, and have the church edifice ready for use by its owner, by March 1, 1896, and that in default thereof they would pay to the

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owner \$50 for every day thereafter that said work remained unfinished, as and for liquidated damages; that the owner, the church corporation, performed all the conditions on its part to be performed, but that the appellants, after having obtained an extension of the time for completing said work until April 5, 1896, failed to finish the same by that date, and that the said work remained in their hands, uncompleted, until June 5, 1896, making a breach of their contract to the extent of sixty days; that the actual damages occasioned by such delay are too uncertain to be fixed by the court; that the said contract was deliberately made, without fraud, and is the agreement of the parties thereto; and that the amount fixed by said contract as liquidated damages is not greatly disproportioned to the loss sustained by the owner of said church building, as a result of the delay on the part of the appellants in finishing the same.

We do not consider it necessary to enter into an extended examination of the authorities upon the vexed question whether the sum named in a contract is to be regarded as a mere penalty, or is to be treated as liquidated damages. We are content to adopt the rule laid down by this court in *Jaqua v. Headington*, 114 Ind. 309, which is this: "Where the sum named is declared to be fixed as liquidated damages, is not greatly disproportionate to the loss that may result from a breach, and the damages are not measurable by any exact pecuniary standard, the sum designated will be deemed to be stipulated damages. * * * If the sum fixed can not be recovered, then there is no exact standard by which the recovery can be measured, and the appellant will be compelled to accept * * * a price fixed by other men upon his own property, and this, too, in a case where the parties have deliberately fixed the value and written it in their contract." The facts found bring this case clearly within the rule stated in *Jaqua v. Headington*, *supra*. See, also, *Martin v. Murphy* 129 Ind. 464; *O'Neal v. Hines*, 145 Ind. 32; *Brown v. Maulsby*, 17 Ind. 10; *Gam-*

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bril v. Doe, 8 Blackf. 140, 44 Am. Dec. 760; *Spicer v. Hoop*, 51 Ind. 365; *Studabaker v. White*, 31 Ind. 211.

The fifth conclusion of law, however, is erroneous upon another ground. All of the facts upon which it rests are found under the third paragraph of the pleadings filed by the appellee, the church corporation, which reads thus: "Third. For a third and further defense said defendants say, that, by virtue of said contract set forth in the plaintiffs' complaint, the plaintiffs agreed to build and complete said church building on or before the 1st day of March, 1896, and that, in default thereof, the plaintiffs should pay to said St. John's Episcopal Church the sum of \$50 per day thereafter that said work shall remain unfinished, as and for liquidated damages. The defendants say that said work still remains unfinished, although more than 200 days have elapsed since said 1st day of March, 1896; that by reason of said failure of the plaintiffs to complete said building, in accordance with the provisions of said contract, on or before the 1st day of March, 1896, the defendant, the St. John's Episcopal Church, has been damaged in the sum of \$50 for each and every day said church remains uncompleted after said 1st day of March, 1896, or, \$10,150. Wherefore the defendants say that said St. John's Episcopal Church and neither of said defendants are indebted further to the plaintiffs, and they ask judgment." The court seems to have treated this paragraph as a counterclaim, and it is made the foundation of a recovery or allowance against the appellants of \$3,000. Its sufficiency was not tested by demurrer in the court below, and in this court it is not assailed by any assignment of error. This court has held in numerous cases that, if the complaint states a good cause of action, and avers facts sufficient to bar another suit for the same cause, defects and irregularities in form will be cured by a general finding or verdict, or by a special finding or verdict which finds the facts necessary to complete the cause of action thus defectively stated, *provided* the facts so found

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are within the issues made by the pleadings. *Robinson v. Powers*, 129 Ind. 480; *Colchen v. Ninde*, 120 Ind. 88; *Peters v. Banta*, 120 Ind. 416; *Du Souchet v. Dutcher*, 113 Ind. 249; *Dreyer v. Hart*, 147 Ind. 604; *Ades v. Levi*, 137 Ind. 506; *Parker v. Clayton*, 72 Ind. 307; 28 Am. & Eng. Ency. of Law, p. 420, (note). But the third paragraph of the pleading filed by the defendants can not be regarded either as a counterclaim or a set-off entitling defendant to affirmative relief.

The distinction between an answer and a counterclaim or set-off is an obvious one. The purpose of an answer is to defeat the action and bar a recovery. A counterclaim or set-off, on the contrary, is a pleading by which the defendant states a cause of action in his own favor, and against the plaintiff. It does not purport to answer the complaint, or to set forth any facts which bar a recovery upon it. It has none of the properties of an answer. It neither admits nor denies the allegations of the complaint. It does not confess and avoid them. Where a defendant succeeds upon an answer going to the whole complaint the only judgment the court can pronounce is, that the plaintiff take nothing by his complaint, that the defendant go hence thereof without day, and, by virtue of the statute, that the defendant recover his costs. If a defendant wishes to obtain affirmative relief against the plaintiff, he must state his cause of action by way of counterclaim or set-off. It is settled beyond dispute that the same pleading can not be treated both as an answer and a counterclaim. The commencement of the third paragraph of the pleading filed by the defendants in this case is in these words: "For a third and further defense said defendants say," etc., and it concludes thus: "Wherefore the defendants say that said St. John's Episcopal Church and neither of said defendants are indebted further to the plaintiffs, and they ask judgment." The paragraph is pleaded as an answer only, and it can not be made the foundation of a judgment for damages, or other affirmative relief, in favor of the defendants, and against the plaintiffs.

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It follows, that, as the pleading does not sustain the finding, the finding does not support the conclusion of law. The exception to the fifth conclusion of law was, therefore, well taken, and should have been sustained.

The sixth, seventh, and eighth conclusions of law relate to the claims of the subcontractors, Martin & Amidon, Laurer & Weiss, and Furlong & Frush, and to their right to foreclose their respective liens. The court found that these claims were due and owing by appellants, ascertained the amount of each, including attorneys' fees, and found, also, that these parties, respectively, held mechanics' liens on the church property.

Looking to the findings of fact and to the pleadings to which they relate, as we are compelled to do, the sixth, seventh and eighth conclusions of law are, beyond doubt, correct. It is insisted that the court erred in allowing the attorneys' fees on each of these claims, but we think the findings clearly justified the action of the court.

The ninth conclusion of law is that the amounts so due from appellants to the subcontractors, and for which the latter had established their liens upon the church property, should be deducted from the sum found to be due to the appellants in conclusion number two. This conclusion is strictly in accordance with the terms of the contract of appellants as found by the court.

The tenth conclusion states that, after deducting from the sum due the appellants, as set forth in conclusion number two, the various amounts allowed the defendant, the wardens, vestrymen, etc., as credits and deductions, the appellants should take nothing by their complaint, and that the wardens, vestrymen, etc., should recover from the appellants \$1,972.32, with their costs. This conclusion rests upon the facts found under the third and fourth paragraphs of the pleading filed by the church corporation; and the exception to it, also, should have been sustained, for the reasons given concerning the fifth conclusion of law. As the

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court found that nothing was due to the appellants, and that they had no claim or lien enforceable against the church corporation, or property, they were not entitled to the allowance of an attorney's fee for foreclosing a mechanic's lien. The payment of their claim extinguished their lien, and there was no basis for the allowance of such fee.

The eleventh conclusion of law is that upon payment by appellants of any or all the judgments in favor of the subcontractors, and against appellants and the church property, the appellants will be entitled to credit for the amount so paid. This conclusion is obviously right, and is for the benefit of the appellants.

The appellee, the church corporation, demurred to the complaint, its demurrer was overruled, and this decision of the court is assigned as a cross-error.

Under this assignment, it is insisted that the defendant church corporation is sued by the wrong name. No plea in abatement was filed, and the question is not properly raised by the record. A church society has a right to choose any name, and for all that appears in the pleadings the name selected by this society was "St. John's Episcopal Church, of Elkhart, Indiana". It might have been incorporated under the name of "The Rector, Wardens, and Vestrymen of St. John's Episcopal Church", etc., but it was not bound to adopt that designation. If it was not incorporated at all, or if it was incorporated under one name, and sued in another, these errors might have been taken advantage of by proper pleadings, but they were not presented by way of plea or answer, and they can not be raised in this case by demurrer for want of facts. §§4729, 4742, 4743 Burns 1894; *Richwine v. Presbyterian Church*, 135 Ind. 80.

The allegation of performance of the contract by appellants was sufficient, and the inconsistency between the date at which the work was to be finished, according to the contract, and the date of its completion, as stated in the complaint, was properly disregarded. Under the averment, as

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made, the appellants would have been compelled to prove that they did, in fact, complete the work on or before March 1, 1896. No excuse for non-performance could have been shown. §373 Burns 1894; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Purdue v. Noffsinger*, 15 Ind. 386; *Plowman v. Shidler*, 36 Ind. 484.

The plans and specifications referred to in the contract were not parts of the contract in such sense as to require that they should be filed as exhibits. The written instrument on which the complaint was founded was the contract to construct the church edifice, in consideration of the sum to be paid therefor. Drawings, plans, specifications, and the like, although referred to in the agreement, did not constitute the written instrument sued upon, and it was not necessary to file the originals or a copy thereof with the pleading. *Continental Ins. Co. v. Kessler*, 84 Ind. 310.

The contract sued upon was, evidently, the contract of the church corporation, and not the agreement of the persons signing it on behalf of that corporation. The instrument is carelessly drawn, and is inaccurate in many particulars, but it is to be construed as a contract between the appellants and the church corporation alone.

The objection that the complaint fails to show a sufficient excuse for the failure of the appellants to obtain from the supervising architect the certificate required by the contract can not be sustained. The complaint avers that the appellants fully performed the contract on their part, excepting the condition thereof requiring them to obtain the certificate of the architect. It is alleged that, after the work was finished, they demanded the certificate, and notified the appellees of their demand, requesting them to cause the certificate to be delivered, but that the same was refused. These averments showed that the appellants were entitled to the certificate, and that it was wrongfully withheld. The facts pleaded in this connection constituted a sufficient excuse for the failure of appellants to procure the certificate.

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Flaherty v. Miner, 123 N. Y. 382, 25 N. E. 418; *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463, 20 S. W. 631. If not proved on the trial, the appellants would have suffered the consequences of their failure to prove a material fact.

The complaint is open to criticism in many respects, but its allegations are sufficient to withstand a demurrer.

For the errors of the court in its fifth and tenth conclusions of law, the judgment in favor of the wardens, vestrymen, etc., of St. John's Episcopal Church against the appellants is reversed, and the cause is remanded for a new trial. The judgments in favor of the subcontractors, Laurer & Weiss, Martin & Amidon, and Furlong & Frush, are affirmed. Baker, J., was absent.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. PARKER, ADMINISTRATRIX.

[No. 18,268. Filed February 2, 1900.]

MASTER AND SERVANT.—Negligence.—Railroads.—Pleading.—Notice of Defects.—A complaint alleging that defendant negligently constructed a side-track, and ordered decedent, an engineer, to run his engine over it, and that decedent, without fault on his part, was killed by the overturning of the engine as a result of the giving away of the side-track is bad on demurrer in the absence of an allegation that decedent had no knowledge of the defective condition of the side-track. *p. 154.*

PLEADING.—Complaint.—Omission of Material Averment Not Cured by Verdict.—The omission of a material averment of fact from a complaint is not cured by a finding of the omitted fact in the special verdict. *p. 155.*

From the Hendricks Circuit Court. *Reversed.*

J. T. Dye, B. K. Elliott, W. F. Elliott and T. S. Adams,
for appellant.

W. N. Harding, A. R. Hovey and C. C. Hadley, for
appellee.

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154	587
154	588
154	153
158	205
154	153
161	683
162	94
162	100
154	153
169	676

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BAKER, J.—Action against appellant to recover damages for negligently causing the death of Henry E. Hurshman. Demurrer to complaint for want of sufficient facts overruled. Trial, and judgment for appellee.

The gist of the complaint is the charge that appellant negligently constructed a side-track, and ordered the decedent, an engineer, to run his engine over it; and that the decedent, without fault on his part, was killed by the overturning of the engine as the result of the giving way of the side-track. There is no averment that the decedent, before going upon the side-track, did not have full knowledge of its dangerous and defective condition.

In cases of this character it is incumbent upon the plaintiff to show by the allegations of the complaint, not only that the decedent was free from fault, but that the risk was one not knowingly assumed as an incident of the service. If the decedent had notice (actual or implied) of the careless and negligent construction of the side-track and its dangerous condition, and thereupon voluntarily proceeded to run the engine over the track, then these conditions became a risk which the decedent voluntarily assumed. It must follow, therefore, that, in order to establish a breach of duty creating a cause of action against appellant, it was necessary to allege that the decedent had no notice of the condition of the side-track. *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265; *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Louisville, etc., R. Co. v. Corps*, 124 Ind. 427, 8 L. R. A. 636; *Wabash, etc., R. Co. v. Morgan*, 132 Ind. 430; *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 Am. St. 251; *Ames v. Lake Shore, etc., R. Co.*, 135 Ind. 363; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496; *Peerless Stone Co. v. Wray*, 143 Ind. 574; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561; *Consolidated Stone Co. v. Summit*, 152 Ind. 297; *Kentucky, etc., Co. v. Eastman*, 7 Ind. App. 514; *New Kentucky, etc., Co. v. Albani*, 12 Ind. App. 497; *Minty v. Union Pacific*

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R. Co., 2 Idaho 438, 21 Pac. 660, 4 L. R. A. 409; *Atchison, etc., R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204; Wood's Law of Master and Servant, §382.

Appellee contends that the error in overruling the demurrer to the complaint is harmless because the special verdict includes a finding that the decedent had no notice and no opportunity to learn that the side-track was in a dangerous condition. To quote from *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638: "This is not the law. When a pleading is tested by demurrer, it must stand or fall by its own averments. It can find neither weakness nor strength from other parts of the record." Furthermore, the supposed finding was not a part of the special verdict. If, in considering the sufficiency of a special verdict or a special finding of facts, a finding not within the issues must be stricken out and disregarded, certainly such a finding could not be considered to be in the record for the purpose of supplying an issue omitted from the pleadings.

Judgment reversed, with directions to sustain the demurrer to the complaint.

Hadley, C. J., took no part in this decision.

RIPLEY ET AL. v. THE MUTUAL HOME AND SAVINGS
ASSOCIATION ET AL.

[No. 18,718. Filed February 2, 1900.]

APPEAL AND ERROR.—*Special Judge.—Competency.—Objections.—Waiver.*—Objections to the competency of a special judge to preside must be made at the time, or the right to object thereto will be waived.

From the Hendricks Circuit Court. *Affirmed.*

H. J. Everett and *C. H. Everett*, for appellants.

Elmer E. Stevenson, for appellees.

MONKS, J.—All the errors assigned by appellants, except the fifth, are predicated upon the theory that section 9 of

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the act of 1897 (Acts 1897, p. 287), §3406i Horner 1897, §4463i Burns Supp., was void, so far as it provides that all contracts theretofore made between borrowers and building and loan associations, for the payment of premiums without any bidding, are legalized. This question was decided in *International, etc., Assn. v. Wall*, 153 Ind. 554, adversely to appellants' theory and contention.

By the fifth error assigned appellants attempt to challenge the appointment of the special judge who tried said cause, on the ground that the person appointed was incompetent. The record shows that appellants filed an affidavit for change of judge in the court below, and that the person appointed to try said cause by the judge of said court was a competent and disinterested attorney of said court. No objection was made by anyone to said appointment, nor was it questioned in any manner in the court below. It is settled in this State that the only questions not waived by a failure to present the same in the court below, and that can be presented for the first time on appeal, are that the complaint does not state facts sufficient to constitute a cause of action, and want of jurisdiction over the subject-matter of the action. *Yorn v. Bracken*, 153 Ind. 492; *Elliott's App. Proc.*, §§489, 674. Under this rule, objections to the competency of a special judge to preside must be made at the time, or the right to object thereto will be waived. *Lillie v. Trentman*, 130 Ind. 16; *Cargar v. Fee*, 119 Ind. 536; *Greenwood v. State*, 116 Ind. 485; *Schlunger v. State*, 113 Ind. 295; *Powell v. Powell*, 104 Ind. 18; *Rogers v. Beauchamp*, 102 Ind. 33; *Adams v. Gowan*, 89 Ind. 358; *Huffman v. Cauble*, 86 Ind. 591; *State v. Murdock*, 86 Ind. 124; *Feaster v. Woodfill*, 23 Ind. 493; *Case v. State*, 5 Ind. 1.

Finding no available error in the record, the judgment is affirmed.

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KAUFMAN v. ELDER, EXECUTOR, ET AL.

[No. 19,123. Filed February 14, 1900.]

DESCENT AND DISTRIBUTION.—Debts of Testator.—Liabilities of Distributees.—Sales of Real Estate for Payment of Debts.—Contribution.—Plaintiff as executor filed a petition to set aside a conveyance of eighty acres of land made to defendant by testator, and for the sale thereof for the payment of a mortgage and other debts of testator. Defendant filed a cross-complaint showing that the mortgage was executed by testator upon 241 acres of land owned by testator which he afterward conveyed as gifts, in parcels, to several persons, including cross-complainant, making the several grantees defendants to the cross-complaint, and asking for the enforcement of a ratable contribution from all. *Held*, that the facts averred were sufficient to entitle cross-complainant to a decree making the indebtedness a charge against all of the parcels of land conveyed by testator as benefactions according to the value of the several parcels.

From the Vermillion Circuit Court. *Reversed*.

M. G. Rhoads and *B. S. Aikman*, for appellant.

H. H. Conley and *R. E. Whitlock*, for appellees.

HADLEY, C. J.—The appellee, Elder, as executor of Benjamin F. McRoberts, filed in the court below his petition to sell real estate to pay debts. The petition stated that the testator left neither widow nor child; that he left a personal estate of the value of \$153, and real estate of the value of \$100, and a probable indebtedness of \$3,700, including a debt of \$2,300 secured by the testator on lands owned by him in his lifetime. It is then averred that the testator, ten days before his death, by deed, conveyed a certain eighty acres of land owned by him, of the probable value of \$4,000, to the defendant, Nancy J. Kaufman, during her nautral life, with remainder in fee at her death to the defendant, Dana Lodge, No. 247, Knights of Pythias; that said conveyance was a gift, and without any consideration; that the testator, at the time of said conveyance, was in-

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debted to various persons in the aggregate sum of \$3,700; and that he had remaining, and afterwards acquired, no other property subject to execution with which to pay his then existing debts; that the testator, before said conveyance, had executed a mortgage on said eighty acres to secure a debt for \$2,300, which remains unpaid.

Prayer, that the conveyance be adjudged fraudulent as against creditors, and that the land be ordered sold for the payment of said mortgage and other indebtedness of the estate.

Appellant's motion to make the petition more specific was overruled, as was also her demurrer thereto. She then filed an answer in two paragraphs, to the second of which the executor's demurrer was sustained. Defendant, the Pythian Lodge, filed an answer in general denial.

Appellant then filed a cross-complaint, which the executor unsuccessfully moved to strike from the files. The executor's demurrer to the cross-complaint was then filed and sustained. Trial on the general issue, finding for the executor, and, after denial of appellant's motion for a new trial, judgment was rendered for the executor to the effect that the conveyance to the defendants, Kaufman and Pythian Lodge, "is hereby declared void as to creditors of said estate, and said real estate is hereby made subject to sale by said executor to make assets to pay the debts of said estate; * * * said real estate to be sold to discharge said mortgage lien and other debts, and the proceeds of such sale shall be applied, first, to the payment of said mortgage indebtedness and then to the payment of other expenses and claims in the order of their priority; and if anything remains after paying all of said indebtedness and expenses, the same shall be paid into court" for further orders. The appraisal of the eighty acres filed was \$3,600.

The appellant has assigned error upon all the adverse rulings, but the real question involved arises upon the action of the court in sustaining the executor's demurrer to the

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appellant's cross-complaint. It is averred in the cross-complaint that the testator in his lifetime was the owner in fee of 241 acres of land in Vermillion county, and that before his death he prepared, signed, and acknowledged five different deeds of conveyance, one of which conveyed to the cross-complainant the eighty acres in controversy; another of which conveyed to said executor, Samuel Elder, forty acres; another conveyed to Sallie A. McCown and Mary A. Ayres forty acres; another conveyed to Ed. McRoberts sixty-six acres; and the other conveyed fifteen acres to the said Samuel Elder, in trust, to pay for the monument and other expenses of the grantor and his estate; that, after the execution of the deeds, the testator delivered all of them at the same time to one James, with instructions that he, James, should keep all of them in his possession until his, the grantor's, death, and thereafter should deliver each deed to the respective grantees therein named; that, pursuant to said instructions, James kept the deeds until the death of the testator and grantor, which occurred on the 26th day of December, 1898, and did thereafter, on the 29th day of December, 1898, deliver each of said deeds to the respective grantees named therein; and that each of said grantees then and there accepted his deed, and still holds the same; that all of said deeds were executed by the grantor without consideration, and were intended by the grantor, and accepted by the several grantees, as gifts, except that the said fifteen acre tract was intended and accepted as a trust for the use of the grantor; that long before the execution of said deeds, the grantor and testator executed a mortgage upon all of said 241 acres to secure to Malone a debt of \$2,300, which is the same mortgage set forth in the petition; that, prior to said conveyance, the testator leased all of said 241 acres to one Robinson for one year from March 1, 1899, for a rental of \$665, which the executor has not inventoried as assets; that said testator left real estate in the town of Dana, undisposed of, of the value of \$200, and that the fifteen acres conveyed to Elder in trust

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for the testator's estate is of the value of \$750. All the grantees named in said several deeds and the lessee Robinson are made parties defendant to the cross-complaint, including the executor in his individual capacity. Prayer, that each of the defendants may be required to answer, and, upon proof of the facts alleged, that the court order that said rental of \$665 be inventoried as assets, and that the deficit in the fund created by the personalty and by the sale of the Dana real estate and the fifteen acres conveyed to the executor, in trust, be assessed and levied ratably upon the lands of the cross-complainant and the lands of the said other grantees, conveyed to them by said several deeds, and that her title be quieted except as against a ratable proportion of the deficit in the payment of debts and expenses of administration.

Two questions are propounded by the demurrer to the cross-complaint: (1) Do the facts exhibited thereby entitle the cross-complainant to a decree that the debt deficit is chargeable, ratably, according to value, against all the several parcels conveyed by the testator as benefactions, at the same time and upon the same terms, or, has the executor the right to have the entire burden of the deficit imposed upon a single parcel, as he may elect? (2) May the issue be made and determined in a proceeding of this character?

Under the averments of the cross-complaint, the conveyances were by the same act, at the same time, and upon the same terms; and the lien of the mortgage and general debts of the estate had equal force and effect against all the 241 acres. The equality of burden was created by the common grantor. It existed at the time the conveyances were made. Each parcel was accepted subject to the mortgage then upon it and the existing rights of creditors. The fraud that will strike down these deeds for the benefit of creditors is but constructive. There was no *mala fides* in any of the grantees, and probably none in the grantor. Exclusive of the

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mortgage indebtedness, by the application of the \$665 of rents contracted for, and the real estate in Dana undisposed of, and the fifteen acres directed to the use of his estate, would probably make the estate clearly solvent. But, aside from all questions of fraud, the fact is clear that all the lands conveyed by said several deeds are held by the grantees impressed in the same way, and to the same extent, by the deficit in the payment of debts. In respect to such situations, "It is a doctrine well established, that when land is charged with a burden, the charge ought to be equal, and one part ought not to bear more than its due proportion; and equity will preserve this equality by compelling the owner of each part to a just contribution." *Stevens v. Cooper*, 1 Johns. Ch. 425, 7 Am. Dec. 499. See also *Falley v. Gribbling*, 128 Ind. 110; *Cook v. Cook*, 92 Ind. 398; *Aiken v. Gale*, 37 N. H. 501; *Stroud v. Casey*, 27 Pa. St. 471; *Beck v. Tarrant*, 61 Tex. 402; *Hall v. Morgan*, 79 Mo. 47; *Beall v. Barclay*, 49 Ky. 261, 265; *Briscoe v. Power*, 47 Ill. 447; *Allen v. Clark*, 17 Pick. 47; *McLaughlin v. Estate of Curtis*, 27 Wis. 644. The approved rule in such cases is that each part, under the common burden, shall stand as principal to the creditor for its proportion of the whole debt, according to the aggregate value of the lands affected; and the other parts stand as its surety, thus securing full protection to the creditor, and natural justice to the several owners. The same equitable principle is embodied in §2738 Burns 1894, relating to contribution by devisees and legatees.

If the cross-complainant, to save the sale of her land, had paid off the common mortgage debt and the other general debts and expenses of administration, and thus relieved the lands of the other grantees from such charge, there would be no doubt of her right to enforce ratable contribution from all. *Falley v. Gribbling*, *supra*, and other cases cited above. And this brings us to the second proposition: Is she entitled to her remedy in this proceeding? We think she is. It is the policy of our civil procedure to avoid a multiplicity of

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suits. By her cross-complaint she presents no defense to the executor's petition. She confesses the charge asserted against her land, and asks, only, that others equally bound may be brought in, and the executor's claim lodged primarily against all those who, in equity and good conscience, ought to pay it. The issue tendered is to codefendants and, however determined, will neither delay nor injure the petitioner. He is, therefore, in no situation to say that in his suit the defendants may not litigate rights and equities among themselves in respect to his demand. The principle involved is analogous though not controlled by §1226 Burns 1894, §1212 Horner 1897, which furnishes sureties "an easy and convenient remedy" to settle in the suit of the payee the question of suretyship among themselves and against the principal.

The court has full power, irrespective of statute, sitting as a probate tribunal to take cognizance of all equitable questions arising in such cases, and will so mold its orders and decrees as will accomplish equity between the parties before it. *Galvin v. Britton*, 151 Ind. 1, 11.

We can not agree with appellees' attorneys that all the facts pleaded in the cross-complaint might have been given in evidence under the general denial. The grantees of said several conveyances, other than appellant, were not made parties to the petition to sell, and, without them being before the court, no question as to them could have been litigated. Substantially the same facts pleaded in the cross-complaint were set up in the second paragraph of the answer. These facts constituted no defense to the petition, and the demurrer thereto was properly sustained.

For error of the court in sustaining the demurrer to the cross-complaint, the cause must be reversed. Judgment reversed, with instructions to overrule the demurrer to the cross-complaint.

MCNALLY ET AL. v. WHITE.

[No. 18,879. Filed Oct. 8, 1899. Rehearing denied Feb. 14, 1900.]

EXEMPTION.—Practice.—Where the court has announced and filed special findings together with conclusions of law thereon, it is too late for defendant to raise the question as to his right of exemption. *pp. 169, 170.*

FRAUDULENT CONVEYANCES.—Exemption.—A decree setting aside a conveyance of real estate as fraudulent against the rights of grantor's creditors does not reinvest grantor with title upon which to found a claim that the land, or the proceeds arising from the sale thereof, be awarded or set apart to him by virtue of the exemption statute. *p. 170.*

SAME.—Order of Sale.—Execution.—In an action by creditors assailing a fraudulent transfer of property, the court may by its decree direct that the property be sold upon an order of sale instead of an execution. *p. 171.*

COVENANTS.—Breach of Warranty.—Measure of Damages.—On a breach of covenants of warranty and partial eviction by reason of the failure of title to a portion of the real estate conveyed, the damages recoverable are the proportionate part of the purchase price with interest. *pp. 171-174.*

From the Hamilton Circuit Court. *Affirmed conditionally.*

Stephenson, Shirts & Fertig and *H. J. Alexander*, for appellants.

I. W. Christian and *W. S. Christian*, for appellee.

JORDAN, C. J.—Action by appellee to set aside an alleged fraudulent conveyance of real estate, and to recover damages for a breach of covenants of warranty contained in a deed executed by appellant and wife to appellee, purporting to convey to the latter certain described lands. The evidence is not before us, and the questions sought to be presented for review arise solely upon exceptions reserved to the court's conclusions of law upon the special finding of facts, and in denying appellant's demands for exemption as a resident householder, and in overruling certain motions made by him to modify the judgment.

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The facts disclosed by the special finding are substantially as follows: Samuel Stern died intestate in 1861, the owner in fee of eighty acres of land situated in Hamilton county, Indiana, leaving surviving him, as his sole heirs, his wife, Jane Stern, together with eight children. By virtue of the statutes of descent, said real estate descended, one-third to said surviving wife, and the remainder to said children. Mrs. Stern, the widow, subsequently intermarried, and became the wife of appellant. After her marriage with him, and prior to July 2, 1883, he obtained warranty deeds from each of said Stern children whereby they purported to convey to him all of their right, title, and interest, present and prospective, in and to said real estate. On July 2, 1883, appellant, Richard McNally, and his said wife, Jane McNally, the latter still holding an undivided one-third interest in the land in question by virtue of descent from her former husband, Samuel Stern, sold and conveyed by warranty deed said tract of eighty acres to the appellee, Wesley S. White, for and in consideration of the price paid, of \$3,200; and on said day appellant delivered possession of the said premises to the appellee. On December 24, 1892, appellee sold this land to one Frank W. Patterson for \$4,400, and, together with his wife, conveyed the same by warranty deed to Patterson, and placed him in possession of the premises. Jane McNally, some time in the month of April, 1893, died, the wife of appellant, and, after her death, her said children by her former marriage with Stern instituted in the Hamilton Circuit Court, on August 12th of the same year, an action against Patterson and the appellee herein for a partition of the land in question. After the beginning of this action for partition, Patterson notified the appellee to appear and defend it, and appellee accordingly notified appellant, in writing, of the pendency thereof, and requested that he appear thereto, and defend the same, or be bound by the judgment rendered therein. Upon the receipt of this notice, appellant appeared to said action, by his attorneys,

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and defended the same in the name of the defendants thereto. The venue of the cause was changed, finally, to the Hancock Circuit Court, wherein a trial by the court, under the issues joined between the parties, resulted in the court finding that four of the plaintiffs were each the owner of the undivided one-twenty-first in value of said real estate, except as to ten acres thereof, and that two of the plaintiffs were jointly the owners of an undivided one-twenty-first part in value, except as to ten acres, and that the defendant, Frank W. Patterson, appellee's grantee, was the owner of all the remainder of said land; and thereupon the court awarded a judgment of partition, and appointed commissioners to divide said lands among said parties according to their respective interests, under the finding and judgment of the court. Partition of the premises was made by said commissioners, and the respective interests of the parties, as found by the court, were allotted to them, all of which was confirmed by the court; and it was ordered and adjudged that the said Patterson yield and surrender to the plaintiffs the part set off to them. On August 7, 1896, after the rendition of the final judgment in said partition action, appellee, in order to protect his grantee, Patterson, under his covenants of warranty, purchased the land set off to the plaintiffs in said partition action for the price of \$925, and caused the same to be conveyed to Patterson. The court further finds that the purchase money of the land sold by appellant to appellee was \$40 per acre, and that the total price of the seventy acres, out of which the portion (five-twenty-first parts) allotted to the Stern heirs in the partition suit was conveyed, was \$2,800, and that the part of the said purchase money corresponding to the interest partitioned to said heirs was \$666.65. After the sale and conveyance by appellant and wife of the real estate to appellee, appellant purchased of one Oliver Armstrong eighty acres of land, situated in Hamilton county, Indiana, and on August 24, 1892, he and his wife, Jane, conveyed forty acres of this tract to appel-

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lant's son, William; and, on August 28, 1893, appellant, then being a widower, conveyed the remaining forty acres of said tract of land, which at that time was of the value of \$2,000, to one Onie McNally, wife of his said son William, reserving unto himself the use, possession, and control of said realty during his natural life. This latter conveyance was upon the consideration and condition that the grantee, Onie McNally, should provide the grantor, Richard McNally, with a comfortable home, and do his washing during the remainder of his life, and, should he demand it, his said grantee agreed to provide him with suitable clothing; and it was further stipulated in the deed that a failure on her part to perform any of the terms, or conditions, was to render said conveyance null and void. The conveyance by appellant to Onie McNally was without any consideration other than that aforesaid stated. She accepted the deed for the land, and performed all of its conditions upon her part until the 3rd day of April, 1894, when, under an agreement with appellant and his daughter, Addie Coverdale, said Onie McNally and her husband conveyed the forty acres to said Addie Coverdale, in consideration that the latter would perform all of the conditions imposed by the deed of appellant to said Onie McNally. On April 4, 1894, in pursuance of the agreement, Addie Coverdale, together with her husband, moved onto said real estate, and appellant then came and resided with her upon the land, and has since that date continued to live and make his home with his said daughter, Mrs. Coverdale, and she has provided for him in accordance with the provisions of said deed. Appellant, since June, 1893, has been unable to perform manual labor, and is now seventy-six years of age, infirm, and in bad health; and the court finds that a reasonable value for the services already rendered by Addie Coverdale for appellant, since the date of the conveyance of the land to her is \$500, over and above the proceeds derived by her for the rent of the land. After the conveyance of the forty acres by Onie

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McNally to Mrs. Coverdale, the latter, together with appellant, mortgaged the land to secure the payment of \$500, the greater part of which money was expended in making repairs and improvements on the land, \$85 thereof being used in the defense of the aforesaid partition suit. The court finds facts showing that, at the time of the conveyance of the said forty acres by appellant to Onie McNally, and by the latter to Mrs. Coverdale, appellant considered the claims which the children of Samuel Stern were asserting to the land conveyed to him by appellee as unjust, and that by means of said conveyance appellant intended to secure a support for himself in his old age, and thereby hinder and prevent the collection of any judgment that might be rendered against him rising out of or connected with the claims made by said heirs of Samuel Stern, and in this manner he intended by said conveyance to defraud the appellee. The court finds that the conveyance of said land, so far as the future services to be rendered by the grantee are concerned, is without any consideration, and operates to hinder and prevent the collection of any judgment that may be recovered by appellee against appellant, all of which appellant and his said grantees, at the time of the conveyance, well knew; and the court finds that to the extent that Mrs. Coverdale has performed the conditions and consideration upon her part, under said deed, she ought to be considered as acting in good faith, but that the conveyance, as to the consideration for the land to be paid by future services, operates or results as a fraud upon the rights and claim of the appellee.

After the conveyance of the said forty acres, appellant had left no other property subject to execution, and his said condition in this respect has ever since continued unchanged. The court's conclusion upon the facts found is to the effect that the plaintiff is entitled to recover a personal judgment against defendant, Richard McNally, for the sum of \$1,000, as damages for a breach of his covenants of warranty. Second, that the judgment rendered in the partition action by

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the Hancock Circuit Court is binding on the defendant, McNally, and establishes his liability upon the covenants of warranty to plaintiff, and that the conveyance of the real estate to Addie Coverdale should be set aside, as to plaintiff, as constructively fraudulent, subject, however, to the mortgage of \$500, and subject to the \$500 allowed her for her services, and that the said real estate ought to be sold subject to the \$500 mortgage and the proceeds arising therefrom should be applied as follows: (1) To the payment of the \$500 in favor of Addie Coverdale; (2) to the payment of the cost of this action; (3) to the payment of the judgment rendered herein in favor of the plaintiff; (4) the remainder, if any, to the clerk of the Hamilton Circuit Court, for the use and benefit of whomsoever may be entitled thereto.

A judgment for \$1,000 was rendered in favor of the plaintiff, and the court, by its decree, set aside the conveyance in question, so far as it affected the rights of appellee, and ordered that the land be sold without appraisal, and the proceeds applied in accordance with the conclusions of law. Appellant reserved exceptions to the several conclusions of law. After the court had announced and filed its special finding of facts with its conclusions of law thereon, and prior to the rendition of judgment on said finding, appellant filed, and presented to the court, a verified application, whereby he demanded an exemption of \$600 of property from sale as a resident householder. This demand, over appellant's exceptions, the court denied. After judgment was rendered, appellant then moved the court to modify its judgment as follows: (1) That it direct in its judgment that appellant's life estate in said land be not sold; (2) that the court order and direct that the land be sold upon execution, to be issued upon the judgment recovered, and not upon decree; (3) that the decree be so modified as to direct said land to be sold subject to appellant's claim for exemption, and that the sheriff be ordered to allow

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appellant his exemption; (4) that the judgment and decree be so modified as to provide that the property embraced in appellant's schedule, filed therein, be appraised by the sheriff, as provided by law, and that his life estate in the lands be valued and exempted to him for a term of years, etc. This motion to modify was overruled, and this action of the court, together with the overruling of appellant's demand for exemption, and the several conclusions of law upon the special finding of facts, are assigned as errors.

If appellant could have availed himself of any rights of exemption as a resident householder, he ought to have seasonably presented such question by answer, and tendered an issue thereon before trial. Certainly the question of exemption could not be presented, as it was, after the court had filed its special finding, which is entirely silent upon this feature of the case. The matter of appellant's exemption, if available to him in this case, could not be properly raised by the methods which he employed. Consequently, the court, for this reason alone, was justified in denying his demand for exemption. *Chandler v. Jessup*, 132 Ind. 351; *Phenix Ins. Co. v. Fielder*, 133 Ind. 557. But aside from the question as to the mode of procedure employed in this case, upon no view do we think appellant could have demanded in this action that the real estate in question, or the proceeds arising from the sale of the fee, should be awarded to him by the court, in whole or in part, as exempt. It is true that the property of a resident householder, which falls within the provisions of our exemption law, is not liable to the claims of creditors arising out of contract, and when the conveyance or transfer of said property to another is assailed by his creditors as fraudulent, as a general rule, it may be shown in such actions upon the trial, as a defense, that the property in dispute, at the time of the alleged fraudulent conveyance, under the provisions of the exemption statute, was beyond the reach of creditors, and that the latter were, therefore, not in a position to attack the transfer. *Phenix*

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Ins. Co. v. Fielder, supra; Citizens State Bank, etc., v. Harris, 149 Ind. 208.

But this is not the question sought to be presented. In the case at bar, as the court finds and adjudges, appellant, having fraudulently conveyed his land to another, is not in an attitude, under the circumstances, to demand that the conveyance be annulled and the property turned over to him under his demand for exemption. The issue tendered by the complaint, in respect to the fraudulent conveyance, was more especially between the plaintiff and the party who claimed title to the land through said conveyance. Appellant, having fraudulently conveyed his property, certainly could not, for his own benefit, legitimately reclaim it, or demand that the proceeds, arising out of the sale ordered by the court, be awarded to him under the provisions of our exemption laws. The decree of the court, setting aside the conveyance as fraudulent, against the rights of appellant's creditors, in no manner served to reinvest him with title to the land. The decree simply established that the conveyance in controversy was null and void so far as it affected the rights of appellee, a creditor, in collecting his claim for damages. The conveyance in question, as between the grantor and his grantee, was valid, and was only open to the attack of the former's creditors who were in a position to assail it as fraudulent. As to all others, it is valid, and must stand. *Kitts v. Willson*, 140 Ind. 604.

Section 715 Burns 1894, §703 R. S. 1881 and Horner 1897, provides that "An amount of property, not exceeding in value \$600, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract," etc. As the land had been conveyed away by appellant, and, as we have heretofore said, the judgment of the court simply canceled such conveyance, so far as the rights of his creditors were concerned, and did not operate to invest him with the title of which he had divested himself, there-

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fore, under the provisions of the statute of exemption, he has no right nor title upon which to found his claim that the land, or the proceeds arising out of the sale under the court's decree, or any part thereof, be awarded or set apart to him by virtue of the exemption statute. *Mandlove v. Burton*, 1 Ind. 39; *Holman v. Martin*, 12 Ind. 553; *Jones v. Dipert*, 123 Ind. 594; *Chandler v. Jessup*, 132 Ind. 351; *Phenix Ins. Co. v. Fielder*, 133 Ind. 557.

It is insisted that appellant ought to have been allowed an exemption out of the life estate which he seems to have reserved in the land. But if this be true, as heretofore stated, he ought to have interposed such claim by way of an answer, and had his rights in the matter determined upon the trial. Appellant can not successfully deny the right of the court, under the circumstances, to direct, as it did, that the land in controversy be sold upon a decretal order, instead of the sale being made upon execution. The rule is well settled that, in an action by creditors, in a court of equity, assailing a fraudulent transfer of property, the court may by its decree direct that the property be sold upon an order of sale instead of an execution. The creditor, having already been hindered in the collection of his debt, ought not, as a general proposition, be further delayed by being compelled to resort to an execution. *Vandever v. Hardy*, 51 Ind. 499; *Bank v. White*, 6 N. Y. 236, and cases cited; *Miller v. Sherry*, 2 Wall. 237; *Neal v. Foster*, 36 Fed. 29.

Neither did the court err in ordering that the sale of the real estate be made without the benefit of the appraisement law. The conveyance being fraudulent, as found by the court, the property was, consequently, under the express provisions of §755 Burns 1894, §743 R. S. 1881 and *Hornor* 1897, subject to be sold without appraisement. *Mugge v. Helgemeier*, 81 Ind. 120.

It is next contended, that, under the specific facts set forth in the special finding, the court did not adopt the cor-

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rect rule for the measure of damages, and that its conclusion of law, in this respect at least, is erroneous. The special finding discloses that the court acted upon the theory that the \$925 paid by appellee to the Stern heirs, to secure their superior title, with interest thereon from the date of payment of this sum, was the legitimate measure of appellee's damages for the breach of the covenants of warranty in appellant's conveyance. The general rule, and the one ordinarily enforced in this jurisdiction, is that, on a breach of covenants of warranty in a conveyance of real estate, where there is an entire failure of title, the whole purchase money, with interest thereon, is the measure of damages. Where, however, there is but a partial eviction, as in this case, by reason of the failure of title to a portion only of the premises conveyed, as a general rule the damages recoverable are the proportionate part of the purchase price, with interest. *Reese v. McQuilkin*, 7 Ind. 450; *Phillips v. Reichert*, 17 Ind. 120, 79 Am. Dec. 463; *Burton v. Reeds*, 20 Ind. 87; *Wood v. Bibbins*, 58 Ind. 392; *Wilson v. Peelle*, 78 Ind. 384; *American, etc., Co. v. Seitz*, 101 Ind. 182; *Rhea v. Swain*, 122 Ind. 272.

Chancellor Kent, in his Commentaries, states the rule as follows: "The buyer, on the covenants of seisin, recovers back the consideration money and interest and no more. The interest is to countervail the claim for mesne profits, to which the grantee is liable, and is, and ought to be, commensurate in point of time with the legal claim to mesne profits." 4 Kent (12th ed.), 475.

The finding discloses that at the time of the conveyance of the land by appellant and wife, the latter owned and held in fee the undivided one-third thereof. This interest she had acquired by descent, as the widow of her former husband. Her right, therefore, there being children alive by her previous marriage with Stern, during her subsequent coverture, to alienate her said interest in the land was, by virtue of section eighteen of the statute of descent, §2641

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Burns 1894, §2484 R. S. 1881 and Horner 1897, suspended, except under the conditions therein provided. Her children by the previous marriage, however, did not become seized with the title to her said interest in the land until her death in April, 1893, when, under the provisions of the above section, it descended to them in fee simple as her forced heirs, and from that time forward they were the paramount owners thereof, entitled to the possession and use of said interest, assuming, however, as we do, that they were not estopped by the warranty deed which they seemed to have executed to appellant.

The court finds, as we have seen, that the part of the seventy acres from which appellee's grantee, Patterson, was evicted, represented \$666.65 of the purchase price of said seventy acres. The exact day in April, 1893, upon which the wife of appellant died is not disclosed by the court's finding. Assuming, however, that it occurred on the fifteenth day of that month, the interest on said sum of \$666.65, from that date to the time of the court's finding, January 15, 1898, would be in round numbers \$190; making the total amount, principal and interest, \$856.65. This, we think, under the facts in this case, is the proper measure of appellee's damages. The amount \$1,000, assessed by the court, is in excess of the amount to which appellee is shown to have been entitled, and is, therefore, not sustained by the case or *Mooney v. Burchard*, 84 Ind. 285.

As to the effect of the warranty deeds obtained by appellant for the lands in dispute from the Stern heirs prior to his conveyance of the premises to appellee, we need intimate no opinion, as that question seems to have been determined and settled between the parties by the judgment of the Hancock Circuit Court, and all parties concerned seem to have abided by this judgment, and, be the same right or wrong, it is not now open to review in this action.

We think that, under the facts found, the amount of recovery awarded by the court is too great in the sum of

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\$143.35, and, in this respect, and in this only, the court erred in its conclusions of law.

If the appellee will, therefore, within thirty days from this date, enter a *remittitur* of \$143.35 upon the judgment below as of the date of its rendition, it will be affirmed at his cost; otherwise, the judgment will be reversed, and the cause remanded to the lower court, with instructions to restate its conclusions of law in respect to the amount of recovery, in accordance with this opinion, and to render judgment accordingly.

ON PETITION FOR REHEARING.

JORDAN, J.—Appellant petitions for a rehearing in this case for the reasons asserted, among others, that we erred in holding that appellee was entitled to interest upon the amount of his damages from the death of appellant's wife, instead of deciding, as it is insisted we should, that he is entitled to interest only from the date of the partition of the lands under the order of the Hancock Circuit Court. Second, that we erred in holding that appellant was not entitled, as a householder, to claim that his life estate in the lands in question was exempt from the sale under the decree.

We held in the original opinion that, under the pleadings in the case, no issue as to appellant's right of exemption was tendered, and that it was too late to raise the question in the manner attempted after the filing of the court's special finding. It is true there are some statements in the finding, in respect to the value of appellant's life estate, and other property aside from the land in dispute, but in regard to the question of appellant's being a resident householder, the finding is silent; and it is sought for the first time, under the application subsequently filed, to inject that issue into the case.

It is contended that appellant, under the general denial, which was the only answer filed by him, had the right to

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show, and did show, that, under his alleged fraudulent deed, whereby he conveyed the land in controversy to his daughter-in-law, Onie McNally, he had reserved a life estate therein, and therefore was in a position to demand that such estate in the land be exempted from the effects of the judgment. This contention can not be sustained. The complaint assailed the deed in question, upon the ground that it was a fraud upon the plaintiff's rights as a creditor; and so far as it interfered with such rights, it sought to avoid this deed as an entirety, and not in parts.

It is true that the special finding discloses that appellant, by this deed, reserved unto himself the use, possession, and control of the land during his life; but this deed, as the court found, was fraudulent as to appellee, and the force and operation of the decree was to avoid or cancel it *in toto*, so far as it interfered with plaintiff's rights as a complaining creditor. The conveyance by appellant of the fee to his grantee, and the reservation unto himself of a life estate, were a part of the same fraudulent transaction, and both depend upon the same deed of conveyance; and the fraud affected the deed as to both, so far, at least, as the rights of appellee, the complaining creditor, are concerned; and the law, under the circumstances, would not have justified the court in holding that the deed, conveying the land in fee, was void against appellee, but valid as to the reservation of the life estate therein.

Appellant can not demand, under the circumstances, that his fraudulent deed be avoided only in part. If it is void, as against appellee, so far as it purported to convey the estate in fee simple to the grantee, it certainly can not be upheld as to the reservation of the life estate in question, to the extent of requiring that the land be sold subject to such encumbrance. The deed, being set aside, or canceled in its entirety, upon the grounds that it was fraudulent as against appellee, we fail to recognize how appellant can, under such circumstances, claim that his alleged life estate,

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which rests upon such fraudulent deed, shall be, as against appellee, in any manner protected or upheld.

We have again considered all of the questions involved in this case, and are satisfied with the conclusions reached thereon at the original hearing. The petition is therefore overruled.

RILEY, ADMINISTRATRIX, v. ALLEN.

[No. 18,920. Filed February 15, 1900.]

APPEAL AND ERROR.—*Record.*—*Instructions.*—In order to make instructions a part of the record without a bill of exceptions the record must affirmatively show that they were filed with the clerk after being given or refused.

From the Boone Circuit Court. *Affirmed.*

T. J. Terhune, for appellant.

S. M. Ralston and *M. Keefe*, for appellee.

MONKS, J.—Appellant asks a reversal of this cause for alleged errors of the trial court in giving certain instructions, and in refusing to give the instructions requested by her.

The instructions given by the court, and the instructions requested by appellant and refused by the court, were not made a part of the record by a bill of exceptions, or an order of court, and the record does not show that those given were filed after they were given and excepted to, nor that those requested by appellant were filed after being refused and the refusal excepted to. Appellee insists that in such condition of the record the instructions given and those refused are no part of the record, and no question is, therefore, presented concerning the correctness of said instructions, or either one of them. This contention of appellee must be sustained.

It is settled that to make instructions given or refused a part of the record without a bill of exceptions or order of court, they must be filed after being given or refused. Merely writing on the margin, or at the close of each instruc-

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tion, "Refused and excepted to", or "Given and excepted to", and showing who took said exception, and dating said memorandum, and the judge signing the same, does not make the instructions a part of the record, but after such exception they must be filed, and the record must affirmatively show that fact before they are a part of the record. *Krom v. Vermillion*, 143 Ind. 75, 77; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 393, 394, and cases cited; *Childress v. Callender*, 108 Ind. 394; *Blount v. Rick*, 107 Ind. 238, 240, 241, and cases cited; *Landwerlen v. Wheeler*, 106 Ind. 523; Elliott's App. Proc. §792; Woolen's Trial Proc. §4063; Ewbank's Manual §28. Instructions are not a part of the record when merely copied therein. *Olds v. Deckman*, 98 Ind. 162.

Finding no available error in the record, the judgment is affirmed.

BARNHART v. THE STATE.

[No. 19,096. Filed February 15, 1900.]

CRIMINAL LAW.—*Burglary*.—*Indictment*.—An information charging that defendant did then and there unlawfully, feloniously, and burglariously in the night-time, break and enter into the barn of F. with intent then and there feloniously and burglariously to take, steal, and carry away certain pieces of meat then and there situate, said meat being then and there of the value of \$3, contrary, etc., is bad for failing to allege that the meat was the property of another than the accused.

From the De Kalb Circuit Court. *Reversed*.

L. J. Blair and *P. V. Hoffman*, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley*, *Willis Rhoads* and *J. E. Pomeroy*, for State.

BAKER, J.—Appellant was convicted of burglary. He assigns that the court erred in overruling his motions in arrest of judgment and for a new trial.

The information charges that appellant, on April 8, 1899,

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at De Kalk county, Indiana, "did then and there unlawfully, feloniously and burglariously in the night-time, break and enter into the barn of one Frank Fiske then and there situate, with intent then and there feloniously and burglariously to take, steal and carry away certain pieces of meat then and there situate, said meat being then and there of the value of three dollars, contrary" etc. Is a public offense stated with sufficient certainty to withstand the motion in arrest?

Burglary is defined in these words: "Whoever, in the night-time, breaks and enters into any * * * barn * * *, with intent to commit a felony, is guilty of burglary." §2002 Burns 1894, §1929 R. S. 1881 and Horner 1897. And petit larceny: "Whoever shall feloniously steal, take and carry, lead, or drive away the personal goods of another, of the value of any sum less than twenty-five dollars, is guilty of petit larceny." §2007 Burns 1894, §1934 R. S. 1881 and Horner 1897. Petit larceny, by the statutes of this State, is a felony. *Short v. State*, 63 Ind. 376. In the information under consideration the breaking and entry are sufficiently stated; but these do not constitute burglary. That crime is committed only when the breaking and entry are done "with intent to commit a felony". The particular felony intended should be stated. The general charge "with intent to commit a felony" is not such a description as would enable the defendant to plead his conviction or acquittal in bar of another prosecution for the same offense. *People v. Nelson*, 58 Cal. 104; *State v. Lockhart*, 24 Ga. 420; *State v. Williamson*, 3 Heisk. (Tenn.), 483; *Portwood v. State*, 29 Tex. 47. It would be adequate, at least as against a motion in arrest, to allege that the defendant broke and entered into the building "with intent to commit larceny therein." *People v. Shaber*, 32 Cal. 36; *State v. Jennings*, 79 Iowa 513, 44 N. W. 799. But if the intent be not so laid, the pleader should aver that the defendant broke and entered with intent to do certain things, the doing of which

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is denounced by the statute as a felony. If a crime—for example, conspiracy to commit a felony,—is not complete without the performance of certain acts “with intent to commit a felony”, the *elements* of the intended felony must be fully disclosed, so that the court may see that a public offense is in fact charged. *Landringham v. State*, 49 Ind. 186; *State v. McKinstry*, 50 Ind. 465; *Scudder v. State*, 62 Ind. 13; *Miller v. State*, 79 Ind. 198; *Smith v. State*, 93 Ind. 67; *McKee v. State*, 111 Ind. 378; *Musgrave v. State*, 133 Ind. 297. But, manifestly, the pleading of an intended felony as an element of some other crime is a very different thing from pleading the intended felony as a committed felony for which the defendant is to be tried. In the case of a breaking and entry with intent to commit larceny, the crime of burglary is complete whether the one who broke and entered effectuated his intent to commit larceny or not. If he accomplished his larcenous purpose and were being held to trial for larceny, the indictment or information, to be sufficient, must contain, among other things, a description of the property and state the value thereof and the name of the owner. And this is so, not because that species of the genus felony might not be otherwise described, but because the defendant is entitled to such a particularization of the individual instance of the species larceny as will protect him from a second prosecution for the same offense. “Feloniously to steal, take and carry away one pair of boots of the value of \$5, belonging to John Smith,” is not a statement of the elements of larceny in general, but does denote a particular case of that crime. Larceny in general is committed whenever one “feloniously steals, takes and carries away the personal goods of another”. Now, if the one who breaks and enters does not carry out his larcenous design, how can the pleader give the particulars of the felony intended but not committed? How can he describe the goods, state the value and name the owner, if the building contain many articles, of various values, of divers

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owners? And it has been held by this court that indictments for burglarious breakings and entries with larcenous intent were sufficient that failed to describe the goods or state the value. *Hunter v. State*, 29 Ind. 80; *Short v. State*, 63 Ind. 376; *Dawson v. State*, 65 Ind. 442; *Burrows v. State*, 84 Ind. 529; *Choen v. State*, 85 Ind. 209; *Sims v. State*, 136 Ind. 358. In each of these cases the owner of the goods was named. By naming the owner, in connection with the other particulars, the pleader disclosed affirmatively all the elements of the intended felony, namely, the felonious stealing, taking, and carrying away of the personal goods of another. And though, in conceivable instances, the pleader may not be able to state the name of the owner any more than the character and value of the goods that were the object of the contemplated larceny, he can and must show directly and affirmatively that what he deems a felony is a legal possibility. Of the elements of larceny, an indispensable one is that the property shall be susceptible of being feloniously stolen, taken and carried away. By our statute, as by the common law, there are two conditions of this susceptibility: (1) That the property be, among other things, personalty (1 Hale P. C. 510; 1 Wharton Cr. Law §§863-882); (2) that the property be that of another than the accused (1 Hale P. C. 513; 1 Wharton Cr. Law §894). One of these conditions is just as essential as the other. The information in this case fails to charge explicitly that the second condition existed. Is the charge adequately supplied by necessary inference? In the first place, it is fundamental that a pleading can not be aided by inference, but that, on the contrary, all intendments are to be drawn against the pleader. If an information charged a breaking and entry with intent feloniously to steal, take and carry away the realty or chattels real of another than the accused, it would be bad. If it charged a breaking and entry with intent feloniously to steal, take and carry away the property of another than the accused, it would be equally bad; for,

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though the term property includes realty and personalty, the intendment against the pleader is that the property was real. If an information charged a breaking and entry with intent feloniously to steal, take and carry away personal goods of the accused, it would be bad. If it charged a breaking and entry with intent feloniously to steal, take and carry away personal goods, it would be equally bad; for, though the term personal goods may include those of another as well as those of the accused, the intendment being against the pleader and in favor of the accused, the information must be taken the same as if the accused were explicitly charged with breaking and entering to recover his own personal goods. But if the rule of pleading were otherwise, the statement in the information in this case regarding the intent to commit a felony does not lead to the necessary inference that the personal goods were not the appellant's. The statement is: With intent feloniously and burglariously to take, steal and carry away certain pieces of meat. The adverb burglariously is without force at this point in the information. The adverb feloniously, though a word of art and indispensable in characterizing acts that are felonies if feloniously done, can not make felonies out of acts that are not defined to be felonies if feloniously done. It is hardly conceivable that any one would contend that an indictment was sufficient that charged the defendant with breaking and entering a house with intent feloniously to gaze upon a picture therein. The act that constitutes, if feloniously done, the felony named larceny and defined in our statutes as such, is the stealing, taking and carrying away of the personal goods of another. To take and carry away goods does not necessarily imply that the goods are susceptible of larceny. And the word steal can not be taken to import exclusively that the property is susceptible of larceny, unless that one word in the definition renders meaningless and surplus the nine words following, namely, "take and carry away the personal goods of another." If stealing, *eo nomine*, were the

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felony named and defined by the statute, this information might be held sufficient to withstand the motion in arrest, as was heretofore stated to be the case if the word larceny had been used. But under our statutory definition (as at common law), the word stealing can not be accepted as the equivalent of larceny. Steal is but one word in the definition; and it will not do to say that the remainder is mere surplusage. Steal does not even denote all the verb-action in the definition. From the time when Latin was the language of the courts, the three verbs steal, take and carry away (*furatus fuit, cepit et exportavit*) have been indissolubly conjoined, each as essential as the other. 1 Hale P. C. 508. Though one *animo furandi* took the personal goods of another, if, instead of carrying them away, he put them down, he would not be chargeable with larceny; and if that were the fullness of his intent in breaking and entering a dwelling, he would not be chargeable with burglary. If the word steal can not displace the words take and carry away, much less can it eliminate the remainder of the definition of larceny, namely, the personal goods of another. It is the transitive verb steal that is used in this definition, and it must have an object. If the object, for either of the two reasons heretofore given, is not susceptible of larceny, the pleader's averment that the accused stole such object would not state the offense of larceny. To quote from Hale (1 Pleas of the Crown 513): "If A and B be joint-tenants or tenants in common of an horse, and A takes the horse, possibly *animo furandi*, yet this is not felony, because one tenant in common taking the whole doth but what by law he may do."

Judgment reversed, with instructions to sustain the motion in arrest. The clerk will issue the proper notice for the return of the accused.

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ROHROF ET AL. v. SCHULTE.

[No. 18,699. Filed November 28, 1899. Rehearing denied Feb. 15, 1900.]

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APPEAL AND ERROR.—Harmless Error.—Where the special finding discloses that it rests upon the facts averred in the second paragraph of complaint, available error cannot be predicated upon the overruling of a demurrer to the first paragraph. *pp. 184, 185.*

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180	498

SAME.—Complaint.—Special Findings.—Where the facts disclosed by the special finding embrace substantially all of the material facts averred in the complaint, and it can be adjudged that the finding sustains the conclusions of law thereon, the sufficiency of the complaint must be affirmed. *p. 185.*

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170	506

FRAUD.—Vendor and Purchaser.—Quieting Title.—Special Finding.

—In an action to rescind a contract and quiet title to real estate given in exchange for city lots, the facts found showed that plaintiff employed a real estate agent to negotiate a sale or exchange of his farm for city property; that the agent pointed out certain lots, and informed plaintiff that M., the owner, would exchange them for his farm, and delivered to plaintiff a deed conveying to him certain described lots, representing that they were the same lots shown him, when in fact the lots described in the deed were situated about three miles further out, in an open prairie, and of much less value than those pointed out; that the agent was the real owner of the lots, and that there was no such person as M. *Held*, that the facts found justified the conclusion that the conveyance was procured by fraud, and that plaintiff's title to his land was not divested thereby. *pp. 185–192.*

SAME.—Vendor and Purchaser.—A vendor of land, who by false representations deceived a purchaser in respect to its location, will not be permitted, in an action by the purchaser to rescind the sale, to excuse his fraudulent acts by the negligence of the purchaser in not examining some map or record from which he might have ascertained the true location of the land, or in otherwise failing to make an investigation or inquiry by which the falsity of such representations might have been exposed. *pp. 192, 193.*

CONTRACTS.—Fraud.—Rescission.—Return of Consideration.—In an equitable suit to rescind a contract on account of fraud, it is sufficient for plaintiff to offer in his complaint to restore what he has received, where he acted promptly upon discovering the fraud. *pp. 193, 194.*

APPEAL AND ERROR.—Evidence.—Bill of Exceptions.—The acts of 1873 and 1897 (Acts 1873, p. 194, Acts 1897, p. 244) both require that the evidence must be embodied in a proper bill of exceptions before it can be certified to the Supreme Court. *pp. 195, 196.*

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From the Pulaski Circuit Court. *Affirmed.*

B. Borders, Wm. Spangler and W. W. Borders, for appellants.

F. L. Dukes, Cutting, Castle & Williams, and *George Burson*, for appellee.

JORDAN, J.—This action was originally instituted by the appellee on October 31, 1893, against Monigunda Rohrof, Julius Rohrof, Charles A. Brillo, and one Henry Meiger, to set aside the conveyance of 120 acres of real estate situated in Pulaski county, Indiana, and to quiet title thereto; which conveyance, it was alleged, had been obtained from appellee through the fraud of appellants.

On July 12, 1895, an amended complaint in two paragraphs was filed. Monigunda and Julius Rohrof separately demurred to each paragraph of this complaint. Their demurrers were each overruled, and they answered by a general denial and also filed a cross-complaint to quiet title to the lands in controversy. There was a trial by the court, a special finding of facts and conclusions of law thereon in favor of appellee, and, over a motion for a new trial, judgment was rendered quieting his title in and to the lands in dispute.

This is a term time appeal and is taken and prosecuted alone by Monigunda and Julius Rohrof. Errors assigned and discussed by appellants' counsel relate, (1) to the sufficiency of each of the paragraphs of the amended complaint; (2) to the sufficiency of the special finding to support the conclusions of law; (3) to the sufficiency of the evidence to sustain the facts found by the court.

The special finding clearly discloses, we think, that it rests upon and responds to the facts averred in the second paragraph of the amended complaint; consequently a correct decision may be reached upon the facts as stated in the special finding; and, therefore, we need not consider the sufficiency of the first paragraph of the complaint, as, under such circumstances, the ruling on the demurrer thereto

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would be harmless. *Smith v. Wells Mfg. Co.*, 148 Ind. 333; *Illinois Central R. Co. v. Cheek*, 152 Ind. 663.

As the facts disclosed by the special finding embrace substantially all of the material ones averred in the second paragraph of the complaint, it is not essential that we set out the latter in this opinion, for it is evident that, in the event it can be adjudged that the special finding sustains the court's conclusions of law thereon, the sufficiency of the second paragraph of the amended complaint, under the circumstances, must be affirmed.

The following may be said to be the facts found by the court: Appellee, plaintiff below, was the owner of the 120 acres of land described in the complaint, situated in Pulaski county, Indiana; and this land was of the value of \$3,000. The defendant, Charles A. Brillo, was a real estate agent in the city of Chicago, Cook county, Illinois. Appellee employed him to sell or exchange the said 120 acres of land for real property situated in the city of Chicago; and he consented to effect the sale or exchange desired by appellee. A few days after accepting this employment, Brillo informed appellee that he knew a person by the name of "Henry Meiger" and that the latter had fourteen lots situated in Morgan Park, a suburb of the city of Chicago; and that Meiger would exchange these lots for appellee's Pulaski county land. A short time after making this proposition to appellee, and before January 11, 1893, he, Brillo, delivered to appellee what purported to be a map of Morgan Park, and indicated thereon the exact location of the fourteen lots proposed to be exchanged by marking with ink the part of the map or plat representing the location of the lots, which were represented on said map to be situated between 107th and 108th streets and Euclid and Blanchard avenues in the said Morgan Park. A few days thereafter, Brillo went with appellee to show him the lots offered for exchange, and pointed out to him eleven lots fronting on Euclid avenue and three lots fronting on Blanchard avenue, between 107th

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and 108th streets, in said Morgan Park, as being the identical fourteen lots which Meiger desired to exchange or trade for appellee's land. The lots which he pointed out or showed to the appellee were situated two blocks west of Western avenue in said Morgan Park, and were each worth \$250 or \$300. Appellee was not familiar or acquainted with the lots, nor with the maps or plats of that part of the city, and knew nothing in regard to them except what Brillo stated and represented to him, and he relied upon the representations of Brillo in respect to the location of these lots and believed that the latter was giving their true location. On January 11, 1893, after the above representations had been made by Brillo to appellee, the latter entered into a written contract to trade or exchange his land for fourteen lots in Grove addition to the town of Morgan Park. At the time appellee signed this contract, he believed that the lots mentioned or described therein were the same which Brillo had shown him, as previously stated. This contract was in duplicate, one of which was signed by appellee and his wife; and thereby they agreed to convey to "Henrick Meiger" the land in Pulaski county; and the other part of the contract purported to have been signed by said Meiger and his wife, and under it they agreed to convey the fourteen lots in Grove addition to Morgan Park to appellee in exchange for his land. This contract and all of the negotiations in respect to the trade or exchange of the lots for appellee's land were made and carried on by and between Brillo and appellee, Meiger at no time being present, and at no time did appellee see him. Brillo, during the transaction, represented to appellee that Meiger could not be present to take part in the negotiations, and further represented that he, Meiger, resided in Cummings or South Chicago and that he was employed at that town in a rolling-mill. After Brillo had shown appellee the lots in Morgan Park, situated as heretofore stated, and before he entered into the written contract mentioned, Brillo made frequent visits to see him, and

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urged him to exchange his land for the lots which he had shown him. After the execution of this contract, Brillo, at his own solicitation, was employed by appellee to examine the abstract of title to the lots described as situated in Grove addition; and thereafter he gave appellee a written opinion that Meiger's title thereto was good, subject only to a mortgage lien of \$600 and certain tax liens. Thereafter on February 9, 1893, appellee and his wife, Emma Schulte, relying on the statements and representations so made by Brillo, and believing them to be true, executed a warranty deed conveying the Pulaski county land to said Meiger, and delivered the same to Brillo at his request and also delivered to him the aforesaid contract, and turned over to him the possession of the land in Pulaski county; and thereupon he delivered to appellee a deed, purporting to have been executed by Meiger and wife, conveying to appellee's wife the lots in Grove addition to Morgan Park, subject to a mortgage of \$600. Appellee at the same time received from Brillo what purported to be the promissory note of Meiger to appellee for \$600, which was in consideration of stock and other personal property owned by appellee and on the land at the time he turned the possession thereof over to Brillo. At the close of the transaction, appellee paid Brillo \$85 as a commission for his services in effecting the exchange. At the time of the delivery of the deed of appellee and wife to Brillo, and of the delivery by the latter of Meiger's deed, Brillo represented to appellee that the lots described in Meiger's deed were the same lots which he had pointed out and shown him, as heretofore stated. These representations made by Brillo were false, and, at the time he made them, he knew they were false. From Brillo's representations, statements, and acts, appellee was induced to believe, and did believe, that the deed for the lots delivered to him conveyed the same lots in Morgan Park, situated on Blanchard and Euclid avenues between 107th and 108th streets, and which were but two blocks west of Western avenue of said

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Morgan Park. In truth and in fact, however, they were not the same lots; and the ones embraced in the said deed were located about three and one-half miles southwest of the lots pointed out and shown appellee by Brillo and were situated over two miles west of Western avenue of said Morgan Park, out in the open prairie; and, at the time of their exchange for appellee's land were of the value of \$33.33, or of the total value of about \$466; all of which Brillo well knew at the time he obtained from appellee the written contract and the deed for the land in Pulaski county.

Appellants, Rohrof and Rohrof, are husband and wife, said Monigunda being the sister of the defendant, Brillo; and, at the time the said negotiations were pending, these appellants resided at Cummings or South Chicago, Illinois, and appellant, Julius, was employed in the rolling-mills in that town. These appellants had knowledge of the negotiations that were being had between appellee and Brillo in respect to the exchange of the real estate in controversy. Before the deeds herein mentioned were executed, said Julius, in company with Brillo, went to see the land of appellee, and was introduced by Brillo to the tenant of appellee, then occupying the land, as "Mr. Meiger." It was stated that he desired to "look over the farm."

About the middle of June, 1893, following the transactions between Brillo and appellee, the latter ascertained and discovered the true location of the lots embraced in the Meiger deed, and thereupon he immediately notified Brillo what he had discovered in respect to the location of these lots, and informed him that he desired to rescind the contract and conveyance. Thereupon Brillo informed him that he could do nothing in regard to the matter, and again stated that Meiger was engaged at work in the rolling-mills at Cummings. Appellee then made an offer to Brillo to reconvey the lots in question to Meiger, and offered to return and deliver up to Brillo for Meiger the said note of \$600 and the mortgage securing the same; and demanded of Brillo

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a rescission of the contract and exchange of the property. The latter declined to accept the deed of reconveyance for the lots, and declined to accept the note and mortgage mentioned; and then stated to appellee that he had no authority to rescind the contract or reconvey to appellee his land. Appellee then made an unsuccessful search to find Meiger, and informed Brillo of this fact; and the latter refused to communicate with Meiger or to make any effort to find him. On June 1, 1893, Brillo delivered to appellant, Mrs. Rohrof, a deed for the Pulaski county land. This deed purported to have been executed by Meiger and wife and purported to have been acknowledged before Brillo, a notary public. This deed was recorded in the recorder's office of Pulaski county, Indiana. There was no consideration whatever for the conveyance of the land in question to appellant, Mrs. Rohrof. After this conveyance, the latter and her husband moved onto the land and took possession thereof. In July, 1895, appellee, being still unable to find Meiger, tendered to Brillo a good and sufficient deed, executed by himself and wife, reconveying the lots in dispute to Meiger, and again offered to deliver to him the \$600 note and mortgage, and, at the same time, offered to reconvey the lots in controversy to Brillo or to any other person that the latter might designate, and again demanded a rescission of the contract. Brillo refused to accept this offer or tender, and refused in any manner to rescind the contract or to reconvey to appellee his land.

The court finds that there is no such person as "Henry Meiger" or "Henrick Meiger," and that the names of "Henry Meiger" and "Emma Meiger", purporting to be husband and wife, which were signed to the deed conveying the lots in controversy, were signed thereto by the defendant Brillo, and that he procured persons to represent Meiger and wife in the execution of this deed; and that he was, at the time, the real owner of the lots in question. The court further finds facts disclosing that appellant, Julius

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Rohrof and wife, colluded with Brillo in the fraudulent transactions leading up to the conveyance by appellee of his land; and that they permitted themselves to be used by him in furthering his fraudulent scheme to perfect the trade with appellee; and that the deed from appellee for the land in dispute was procured by the means of fraud; and with the fraudulent intent and purpose, upon the part of Brillo, to cheat and defraud appellee; and that the deed purporting to convey said land to Mrs. Rohrof was procured and made in furtherance of the fraudulent purpose by Brillo and said appellants; and it is further found by the court that Brillo and appellants are the only parties that were connected with the transaction leading up to the exchange of the lots and land in controversy; and that they are the real parties interested in the event of this action.

After the filing of the amended complaint, appellee brought into court the deed reconveying the lots to Meiger, and the \$600 note and mortgage securing the same; and these papers were placed in the custody of the trial court. The court, upon the facts found, concludes that the conveyance of appellee to Meiger for the land in question, and also the deed from Meiger to the defendant, Monigunda Rohrof, were procured by fraud, and that the plaintiff's title to his land was not divested thereby.

It is true that the trial court has embraced in its special finding some matters of an evidentiary character, still the legitimate facts, as therein set forth, are sufficient to expose that the conveyance of appellee's land which he, by his action, invokes the court by its decree to set aside and annul, was procured through the fraudulent scheme projected by the defendant Brillo, to which his codefendants, appellants herein, appear to have been parties, and aided in the furtherance thereof. The facts reveal such a clear case of fraud, upon the part of the defendant Brillo, and that the conveyance, upon the part of appellee, was procured thereby, that surely there can be no contrariety of opinion in respect to these features of the case.

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After the employment of Brillo by appellee, to sell or exchange his land for property in Chicago, it appears that the former, in order more successfully to carry out his fraudulent scheme, constructed a fictitious individual denominated "Henry Meiger", and in the name of this feigned and imaginary party he conducted the negotiations which finally led up to and resulted in obtaining a deed for appellee's land.

To recapitulate, it is disclosed that Brillo went with appellee to Morgan Park, a suburb of the city of Chicago, and there pointed out to him fourteen lots, of the value of from \$250 to \$300 each, situated on the streets and avenues mentioned, and represented to him that these were the ones which Meiger desired to exchange for the land in controversy. Aside from Brillo's representations or statements, appellee was wholly uninformed in respect to the location of the lots proposed to be exchanged for his land. At the time he entered into the written contract, and at the time he executed his deed of conveyance, Brillo stated, or represented, that the lots embraced in the Meiger deed, and conveyed in exchange for appellee's farm, were the same which had been previously pointed out by him to appellee. The latter, relying upon these representations, and believing that he was receiving, in exchange for his land, the same identical lots situated in Morgan Park, upon the streets heretofore stated, was induced finally to execute his deed of conveyance. All of these representations were false, and known by Brillo to be so at the time he made them. Instead of conveying the lots previously shown to appellee, which he, under Brillo's representations, was led to believe he was receiving, other lots situated in a remote part of Morgan Park, in the open prairie, and of the total value of \$466, were conveyed in exchange for a tract of land of the value of \$3,000.

Counsel for appellants contend that the representations made by Brillo, as shown under the averments of the com-

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plaint, and as disclosed by the court's finding, are not such as to justify appellee in relying thereon, as it does not appear that there was anything done by Brillo to prevent him from ascertaining the true location and character of the lots. It is insisted in the argument that the public records were at all times open to his examination, and from them he might have discovered the location of the lots. There is no merit in this contention. As a general rule, a contracting party has a right to rely on the express statement made in respect to a material, existent fact which is the basis of a mutual agreement or engagement, when the truth or falsity of such fact is known to the party making the statement, but unknown to the one to whom it is made. The latter, under such circumstances, is not required, before the final consummation of the engagement or agreement, to investigate or make a searching inquiry in regard to the truth or falsity of the statement or representation made by the other contracting party. *Kramer v. Williamson*, 135 Ind. 655, and authorities there cited; *Ross v. Hobson*, 131 Ind. 166. Brillo, having pointed out certain lots at the very place where they were located, thereafter, at the final consummation of the deal, induced appellee, through deceit or fraudulent statements, to believe that he was receiving a conveyance for the same identical lots. Appellee certainly had the right, under such circumstances, to rely upon these statements without resorting to an examination of the public records. *Campbell v. Frankem*, 65 Ind. 591; *Backer v. Pyne*, 130 Ind. 288.

As a rule, a person, in his dealings with another, is justified in relying upon a positive representation made by the person with whom he is dealing, in regard to a material, existing fact, when to discover the truth or falsity thereof would require investigation. A vendor of land who, by his false representations, has deceived a purchaser in respect to its location, will not be permitted, in an action, to excuse his fraudulent acts by the negligence of such purchaser in not

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examining some map or record from which he might have ascertained the true location of the land, or in otherwise failing to make an investigation or inquiry by which the falsity of such representation might have been exposed. *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496; *Hook v. Bowman*, 42 Neb. 80, 60 N. W. 389; *Dodge v. Pope*, 93 Ind. 480; *West v. Wright*, 98 Ind. 335; *Ledbetter v. Davis*, 121 Ind. 119.

Again, on another view of the question, Brillo was the agent of appellee to effect the sale or exchange of his land. Where one occupies the position of an agent, or any like position, he is required in all negotiations and contracts to state all matters within his knowledge fully and truly to his principal, and to make no representations which are not true in every material particular; and, as a general rule, the principal, by reason of the confidential relation existing between himself and his agent, has the right to rely and act upon the statements of the latter. *Robinson v. Glass*, 94 Ind. 211.

Appellants also urge, as an objection to both the complaint and special finding, that neither discloses that appellee, upon discovering the fraud in regard to the location of the lots, made a sufficient tender back of what he had received and demanded a rescission. The finding of the court shows that Brillo was the real party to the transaction, which he conducted in the name of a fictitious person; and that, before the commencement of this suit, appellee went to him and offered to reconvey the lots to Meiger; and to deliver up the note and mortgage, and demanded a rescission. But Brillo, it would seem, in order to conceal his fraud and to prevent appellee from restoring what he had received, denied that he had any authority to accept what appellee offered to return, and made a positive statement that he could do nothing in regard to the matter, and renewed his false statement that Meiger was at work in the rolling-mill at Cummings. Finally, it appears that, after the com-

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mencement of this action, and after appellee's search for Meiger had proved to be destitute of any discovery of that feigned individual, he tendered to Brillo a good and sufficient deed, executed by himself and wife, reconveying the lots to Meiger, and again offered to deliver up the note and mortgage; and at the same time offered to convey the lots to Brillo or to any other person that he might designate, and again demanded a rescission; all of which was declined.

After the filing of the amended complaint, this deed of reconveyance, together with the note and mortgage in question, was lodged with the court subject to its order. These offers and attempts to restore and rescind, upon the part of appellee, as shown by the complaint and also by the special finding, were, under the entanglements and complications of the case brought about by the deficit of Brillo, certainly the utmost that could be exacted of appellee.

As a general proposition, in an equitable action to rescind, where the decree of the chancery court is invoked in order to secure a rescission, the strict rule, prevailing in cases at law, which requires a tender to be seasonably made before the commencement of the suit, does not control. In an equitable suit to rescind, on account of fraud, where the plaintiff has acted promptly upon discovering the fraud, and is in a position to restore the benefits received, it will be sufficient, in such a case, for him to offer in his complaint to restore what he has received; for, under such offer, the court may so mold its decree as to regulate, adjust, and protect the rights of the parties upon such conditions or terms as may be compatible with equity and good conscience. *Higham v. Harris*, 108 Ind. 246; *Westhafer v. Patterson*, 120 Ind. 459. It is at least evident, under the facts, that there was no such disposition manifested by appellee to hold on to what he had received as would deny him a standing in a court of equity to rescind the conveyance in question.

Again, upon another view, Brillo, by wrongfully denying that he had the right to accept the reconveyance, and in

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concealing the fact from appellee that he, and not the alleged "Meiger", was the proper person to whom the lots, and other benefits received, should be restored, is surely, under the circumstances, not in a position to complain of the insufficiency of the tender. If there has been any failure in this respect, the blame therefor ought to be attributed to him, and not to appellee, whom he misled by the suppression of the truth that he and not Meiger was the person to whom restoration should be made. *Platter v. Board, etc.*, 103 Ind. 360; *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189; *Hammond v. Pennock*, 61 N. Y. 145. It must follow, and we so conclude, that the second paragraph of the amended complaint, upon which the special finding rests, is sufficient to withstand a demurrer, and that the facts embraced in the finding sustain the court's ultimate conclusion.

It is next and finally insisted that the evidence does not sustain the finding. Counsel for appellee, however, contend that the evidence is not properly in the record, for the reason, among others urged, that the longhand transcript thereof has not been embodied in the bill of exceptions. With this contention we are compelled to concur. An examination of the record discloses that what purports to be a bill of exceptions, embracing the evidence, is nothing more than a mere transcript of the shorthand report of the evidence given upon the trial, which seems to have been filed with the clerk and signed by the trial judge; and, in this condition, it has been certified to this court.

This appeal was filed on July 9, 1898, and, consequently, the certification of the evidence must conform to the provisions of either the act of 1873 (Acts 1873, p. 194), or the act of 1897 (Acts 1897, p. 244). Both of these laws require that the evidence, before it can be certified to this court on appeal, must be embodied in a proper bill of exceptions; otherwise it can not be considered as a part of the record. *Wagoner v. Wilson*, 108 Ind. 210; *City of Alexandria v.*

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Cutler, 139 Ind. 568; *Jenkins v. Wilson*, 140 Ind. 544; *Porter v. Fraleigh*, 19 Ind. App. 562; *Luckenbill v. Kreig*, 153 Ind. 479.

The evidence not being properly before us no questions depending thereon can be considered. There is no available error, and the judgment is therefore affirmed.

GALLUP, EXECUTOR, v. SCHMIDT, TREASURER.

[No. 18,812. Filed February 16, 1900.]

TAXATION.—Placing Omitted Property on Tax Duplicate.—Notice.—Executors and Administrators.—Nonresidence.—The official residence of an executor, so far as the taxation and administration of the assets of the estate are concerned, is in the county of his appointment, and a notice to appear before the county auditor and show cause why property of the estate should not be added to the tax duplicate, under §8560 Burns 1894, is not void for the reason that the executor resided in another state. *pp. 200, 201.*

SAME.—Executors and Administrators.—Nonresidence.—Notice.—Constitutional Law.—An executor residing in another state, who was present and served with notice of intention of county auditor to add to the tax duplicate omitted property belonging to the estate, under the provisions of §8560 Burns 1894, cannot assail the constitutionality of said section on the ground that it attempts to provide for the assessment and taxation of omitted property owned by nonresidents of the State, without affording such nonresident notice or a day in court. *pp. 201, 202.*

SAME.—Placing Omitted Property on Tax Duplicate.—Notice.—Nonresidence.—Constitutional Law.—Section 8560 Burns 1894 providing notice to property owners by county auditor of intention to add omitted property to tax duplicate is not unconstitutional for failure to provide notice to nonresidents, since such assessment is not final and the nonresident is not deprived of his day in court. *p. 202.*

SAME.—Executors and Administrators.—Failure to Pay Taxes.—Duty of County Treasurer.—The provision of §8587 Burns 1894 requiring the county treasurer to report to the court the delinquency of an executor or administrator in the payment of taxes due from the estate is imperative, but, in so far as the statute prescribes the time, it is directory only. *pp. 203-207.*

PRACTICE.—Harmless Error.—Overruling a demurrer to a complaint against an executor to require him to pay taxes due from the

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estate in which the amount claimed to be due exceeded the amount of money in the hands of the executor was harmless, where the recovery was for an amount less than that shown to be in the hands of the executor. p. 207.

TAXATION.—Assessment of Omitted Property by County Auditor.—In a proceeding by the county auditor to place omitted property of testator on the tax duplicate for taxation, under the provision of §8581 *et seq.* Burns 1894, it appeared that testator from 1881 to the time of his death in 1893 had been in the banking business, loaning money and dealing in bonds; that during this time it did not appear that he made or lost any large sum of money, and he annually returned personal property for taxation varying from \$14,000 to \$24,000. At the time of his death he left a personal estate of taxable property appraised at \$883,906.46. The executor, who was the brother of testator, and practically his sole beneficiary, refused to produce testator's books and accounts, and the auditor made an assessment of omitted property, taking the amount returned by the executor as a basis, and deducted five per cent. as the probable net annual increase, and the result thus reached he took as the true amount for 1892, and from this he deducted five per cent. and took the result as the correct amount for 1891, and so on back to 1881. *Held*, that the assessment made by the auditor will be presumed to be correct, and will not be overthrown in the absence of the preponderance of the evidence to the contrary. pp. 207-212.

SAME.—Assessment of Omitted Property by County Auditor.—Correction by Court.—Where the county auditor in placing omitted property on the tax duplicate for taxation deducted therefrom an amount which would produce an amount voluntarily paid by testator's executor, the court erred in again deducting such sum from the amount assessed against the estate by the auditor, since if the assessment was improper it should have been set aside *in toto*. pp. 212-216.

SAME.—Assessment of Omitted Property by County Auditor.—Penalties.—Under the tax statutes penalties and interest can only be imposed for the nonpayment of taxes after the property has been placed upon the tax duplicate, and there is no authority for adding the penalty and interest to omitted property placed upon the tax duplicate by the county auditor which would have accrued if the property had been placed on the tax duplicates at the proper time and the taxes not paid. pp. 216, 217.

From the Marion Circuit Court. *Reversed.*

W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller, for appellant.

W. L. Taylor, Attorney-General, Merrill Moores and C. C. Hadley, for appellee.

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HADLEY, C. J.—William P. Gallup, having for thirty-one years been a resident therein, died testate in the city of Indianapolis, Marion county, in December, 1893, the owner and in possession of a large personal estate in said county. His will was duly admitted to probate in the Marion Circuit Court, and Edward P. Gallup, a resident of the state of New Hampshire, the principal and residuary legatee, was qualified as executor in January, 1894, and March 5, 1894, filed an inventory showing a personal estate of \$492,628.26. Subsequently, in the spring of 1894, said executor listed to the assessor for taxation for the year 1894 personal property of the estate aggregating \$383,906.46. January 15, 1895, Taggart, then auditor of Marion county, discovered what he believed to be credible information that a large amount of personal property belonging to and in possession of said decedent had not been listed for taxation for the years 1881 to 1893, both inclusive, and upon that day, acting under §8560 Burns 1894, caused to be served by the sheriff upon Edward P. Gallup, as executor, who was at the time in Indianapolis engaged in the settlement of said estate, notice in writing of his intention to add such omitted property to the tax duplicate, and requiring such executor to appear before him within five days to show cause, if any, why such property should not be so added. The notice specified the property to be added as county, township, town, and other bonds, notes, mortgages, claims, dues, demands, and other credits, money on hand and on deposit. January 19, 1895, the executor appeared before the auditor, and filed written objections to the authority of the auditor to proceed further, which were overruled. The executor then filed an answer to the notice, and, on the 21st day of January, 1895, the auditor issued a subpoena for the executor, requiring him to appear forthwith before him, and to bring with him all notes, mortgages, and bonds in his possession as such executor, to testify in said proceeding. The executor appeared on the 24th day of January, 1895, and filed further objections to

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the jurisdiction of the auditor, which were overruled, and thereupon he was examined under oath. Upon consideration of the evidence, the auditor found that William P. Gallup, in addition to the property returned by him for taxation, was the owner and in possession of other taxable personal property, not listed, and not taxed during the several years from 1881 to 1893, specifically stated for each year, and January 25, 1895, placed the same upon the tax duplicates, and computed and extended taxes thereon for the whole of said period, including statutory penalties and interest, the sum of \$61,233.59. After the same was placed upon the duplicate in the treasurer's hands, he made demand upon the executor to pay said additional taxes, but he refused to pay all, or any part thereof.

The executor, on the 4th day of January, 1895, filed in the circuit court his final settlement report, and gave notice that the same would be finally heard on the 26th day of January, 1895; and upon the day set for the hearing of the report, the same being the next day after the additional assessments had been placed upon his duplicate, Holt, as treasurer of Marion county, filed in said court, under §8587 Burns 1894, in the term thereof that was then running, his petition for an order upon the executor to show cause why he should not pay the taxes assessed by the auditor. The order was granted, and, on February 9, 1895, the executor appeared and filed his motion to dismiss said proceeding for the reason that the court had no jurisdiction to proceed to hear the cause, for the reason that the county treasurer was not authorized, under the law, to present said claim to the court at the January term, 1895. More than two years afterward, to wit, December 18, 1897, the court overruled appellant's motion to dismiss; and on June 18, 1898, appellant filed his answer in eight paragraphs. A demurrer to each, the third, fourth, fifth, and sixth, was sustained. A trial was had before the court upon the issues joined upon the petition, answers of general denial, payment, and set off; and, upon

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a special finding of facts and conclusions of law favorable to appellee, judgment was rendered against appellant that he pay to appellee, on account of said omitted taxes, the sum of \$46,996.69.

The errors assigned call in question the authority of the auditor to assess omitted property of this estate; the sufficiency of the complaint; the sufficiency of the third, fourth, fifth, and sixth paragraphs of answer; the correctness of the conclusions of law; the constitutionality of §8560 Burns 1894; the overruling of appellant's motion for a modification of the special finding and for further statement of conclusions of law, and for a new trial. The questions will be considered in such general groups as appellant has seen proper to present them.

The auditor proceeded under §8560 Burns 1894, which, among other things, provides: "But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof, resides in the county and is not present, he shall give such person notice, in writing, of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office at a specified time, within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate."

Appellant insists that the proceedings of the auditor under this section were unauthorized and void, for the reason that he was not a resident of the State of Indiana, and that the notice to him to appear before the auditor, being unprovided for by the statute, was ineffectual as a legal notice; and that, notwithstanding his appearance under objection and protest, the question must be determined as if he had received no notice, and was not present when the auditor considered and added such alleged omitted property. We are unable to yield our assent to appellant's contention. The official residence of the executor, so far as the taxation and administra-

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tion of the assets in his possession were concerned, was in Marion county. As a trustee of the property, he had his creation by the Marion Circuit Court, and had no existence or authority outside of said county, except as he drew it from the court of his appointment. In contemplation of law, he is ever present and officially resident in the Marion Circuit Court during the pendency of his trust, and required, without notice, other than presentation, to answer to every sort of claim or demand, within the jurisdiction of the court, asserted against the assets in his hands for administration. He is an officer of the circuit court of Marion county, in possession of property located in and subject to taxation within the taxing district of said county, and while present in the county, engaged in exercising his office and administering his trust, invoking the aid of the law, and subject to its mandates, he was in his official capacity such a resident of Marion county as comes within the purview of §8560, and amenable to our taxation laws, so far as they affect his trust, in the same manner as if his personal residence had been in the county. It follows, therefore, that the auditor had sufficient authority to proceed to place upon the tax duplicate any omitted property of the estate that had escaped taxation.

It is next contended that §8560 is in violation of §2 article 4 of the Federal Constitution, and of the 14th amendment thereto, and of §12, article 1 of the Constitution of the State of Indiana, and, therefore, void in so far as it attempts to provide for the assessment and taxation of omitted property owned by nonresidents of the State, without affording such nonresident owners notice, or a day in court, while such right is accorded to resident owners; that it is a denial of equal privileges and immunities to citizens of the several states; that to nonresidents it is a taking of property without due process of law. A sufficient answer to this is that appellant was an official resident of Marion county at the time the proceeding by the auditor was commenced, and, therefore, within the express terms of the section. He was in a

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situation to avail himself of all the rights and privileges he asserts are unjustly denied to nonresidents, and, while himself not aggrieved, he will not be permitted to assail a revenue statute on behalf of others who are making no complaint. The courts are open to those only who are injured. *Gustavel v. State*, 153 Ind. 613; *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1; *Currier v. Elliott*, 141 Ind. 394, 407.

Conceding all that appellant affirms concerning his residence and the absence of any provision in §8560 for service of notice on nonresidents, still, he is not in a situation to complain that he has had no day in court. The assessment by the auditor, right or wrong, was not a final judgment. It was only *prima facie* correct. The courts were open to appellant, even though a nonresident, to challenge it by injunction. Failing thus to seek relief against it, the treasurer appealed to the circuit court for an order against him to show cause why he did not pay the taxes. The jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire. He was ordered by the court to show cause, if he had any, why he did not pay the taxes. In response to the order, any defense he had, or ever had, was open to him.

It is no longer an open question in this State that if a party, against whose property an assessment has been made, is, at any time in the course of the proceeding, before a conclusive judgment, afforded by law an opportunity to contest its correctness, he is accorded due process of law within the meaning of the fourteenth amendment. *Garvin v. Daussman*, 114 Ind. 429; *Johnson v. Lewis*, 115 Ind. 490; *Kizer v. Town of Winchester*, 141 Ind. 694; *Edwards v. State*, 143 Ind. 84. See also *Davidson v. City of New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist.* 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569. Moreover, the right to tax property is a sovereign right reserved to the jurisdiction charged with the duty of its protection; and the authority of a taxing district to require all classes

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of property sheltered by it to pay their ratable proportion of the expenses of maintaining the government is unaffected by the residence of the owner. The legislature has plenary power to create a tax for public revenue against all property located in the State, and to provide the procedure for its levy and collection. This had been done by public laws of which all persons, residents and nonresidents alike, must take notice and conform thereto without special summons. The State can not be deprived of the tax because the owner is a resident of another State. *Buck v. Miller*, 147 Ind. 586, 596, 37 L. R. A. 384; *Board, etc., v. Reeves*, 148 Ind. 467, 476; *Chicago, etc., R. Co. v. John*, 150 Ind. 113; *Graham v. Russell*, 152 Ind. 186.

Appellant next contends that the action by the treasurer of Marion county, commenced the next day after the omitted taxes were placed upon his duplicate, in the then running term of the circuit court, was prematurely brought, under §8587 Burns 1894. This statute provides that it is the duty of an executor to pay the taxes due upon the property of his testate, and, if he neglects to pay the same, the county treasurer shall present to the circuit court, or other proper court of the county, at the next term thereafter, a brief statement, in writing, setting forth the fact and amount of such delinquency, and such court shall at once issue an order to such delinquent, commanding him to show cause within five days why such tax should not be paid, and, upon his failure to show good cause, the court shall order him to pay such taxes from the assets in his hands. The position of appellant is that the treasurer had no authority of law to proceed in the circuit court until the next term after appellant had refused to pay the taxes due; that the words "next term thereafter" must be held to mean the term occurring next after the expiration of the one then running. The substance of the insistence is that the statute is mandatory, and the right of the treasurer to proceed thereunder, being created thereby, must be limited to the strict letter of the law. But why

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should the statute be held mandatory in respect to the bringing of the action at the next term thereafter? Is there any apparent reason behind it that warrants such a restriction upon the power of the treasurer? The evident purpose of the statute is to aid in the collection of public revenue, and must be liberally construed. It is directed against a fiduciary who refuses to perform a positive duty, and who is entitled to no indulgence under any known principle of the law.

The rule relating to such questions, reasserted by this court in *Wampler v. State*, 148 Ind. 557, at page 568, 38 L. R. A. 829, and which had been previously approved in at least five appeals cited therein, follows: "Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer." It can not be said that the words employed in §8587 Burns 1894 show that the legislature intended that the treasurer should proceed in the next term thereafter, or not proceed at all; that is, that it was intended his power in that respect should be confined to and exhausted at a particular term. There are no words that he shall not proceed at a term subsequent to the "next term thereafter," or that he may, or that he shall not proceed at a current term; and when we consider that the object of the statute was to furnish a speedy and convenient remedy against a delinquent fiduciary, and that the ultimate purpose could not be fulfilled until the taxes withheld were actually paid, it seems unreasonable that the legislature should intend to confine the benefits of the remedy to a particular term of court. It seems clear that the purpose of the statute was to furnish a summary remedy against a delinquent officer of the court. The statute reads that it shall be the duty of every executor to

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pay the taxes due upon the property of the deceased, and, in case of his neglecting to pay any instalment when due, when there is money on hand to pay the same, the treasurer shall present the fact to the court at the *next* term thereafter, that is, at the term standing nearest to the default,—the first opportunity,—and such court *shall at once* issue an order commanding such executor to show cause within five days why such taxes should not be paid. Such defaulting officer is not to be treated as an ordinary litigant, for such court shall at once command him to account for his conduct within five days. The reasonable view of the statute seems to be that, in proper cases, the duty of the treasurer to bring the action is imperative; but, in so far as it prescribes the time when it should be brought, the statute is directory only. *Sackett v. State*, 74 Ind. 486, 489.

It is a rule of procedure, as old as our jurisprudence, that a plaintiff may bring his suit as soon as his right of action accrues, but whether he shall proceed with it depends upon whether he has given the defendant such notice as the law requires; and if the service of notice upon the defendant is insufficient in point of time for the term at which the suit is brought, the only penalty is a continuance, by operation of law, to the next term when the service becomes valid. *Eastes v. Eastes*, 79 Ind. 363. Whether the defendant is required to answer at the term current does not affect the right of the plaintiff to bring his suit, and, if the action is stayed a sufficient time to make the notice legally sufficient, it is all a defendant is entitled to.

In this case the taxes had been assessed, placed, and extended upon the duplicate, were due, and appellant had refused to pay them. The right of action was fully matured when the complaint was lodged in the circuit court, and while the record shows that appellant appeared to the action thirteen days afterward, and moved a dismissal of the complaint, the record also further shows that no action was taken by the court, or requested by appellee, for more than

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two years afterward, which would seem to be sufficient time in which to prepare a defense. We therefore hold that the bringing of this suit by the treasurer in the current January term was authorized by §8587, *supra*, and a stay of proceeding until after "the next term thereafter" removed from appellant all possible ground of complaint.

The case of *Ledyard v. Dix* (Mich.), 79 N. W. 918, so vigorously urged upon our consideration as holding a contrary doctrine, can not be accepted as a support to appellant's contention. Under the statute of Michigan (Act 206, 1893, §62), when the auditor-general filed his petition in the circuit court for a decree of sale of lands returned delinquent in the payment of taxes within the county, it became the duty of the court to make an order upon the petition designating the term of court at which the petition should be heard, and that "all persons interested in such lands, * * * desiring to contest the lien claimed thereon by the state of Michigan for taxes, * * * shall appear in said court and file with the clerk * * * their objections thereto, *on or before the first day of the term* of this court above mentioned, [that is, the term designated in the order] and that in default thereof the same shall be taken as confessed". The statute further provides that, in lieu of personal service, a copy of said petition and order entered thereon shall be published in a newspaper of the county for four weeks, and that at the opening of the court, at such fixed term, the court shall give precedence to the hearing of such petition over all other business. The terms of the court met in September, January, April, and June. In the *Ledyard* case, the auditor-general filed his petition September 25, 1895, in the running September term, and two weeks after it had commenced; and, instead of making it returnable on the first day of the next term, as the statute expressly provided it should be, it was made returnable, and a decree of sale entered, upon a subsequent day of the same term. The subject under consideration related purely to the question of

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process, and to the inviolability of the length of notice, fixed by statute, that should be given a defendant to appear and plead to the action, concerning which the court says: "It is apparent that §62 gives the right to a property owner to have until the commencement of the next term after the petition is filed to make his contest. It is an axiom of law that a litigant is entitled to his day in court. * * * If he watched the columns of the paper designated as the one in which the notice of hearing was to be published, until the commencement of the term of court, and no notice of the hearing of tax cases for that term is published, has he not a right to assume that no hearing will be had until a subsequent term?"

The amount claimed by appellee to be due on account of delinquent taxes, penalty, and interest was \$61,233.59. It was alleged in the complaint that said executor had on hands \$50,000 in money, and \$350,000 in negotiable bonds and other securities readily convertible into money at their face value. Appellant contends that the demurrer to the complaint should have been sustained for failure to show enough money on hands with which to pay the taxes, as provided by said §8587. The amount demanded in the complaint included penalty and interest upon the several years' delinquencies, which the court found appellee had no right to recover, and failed to note the credit of \$5,750 paid before suit, as shown by the special finding; and plaintiff's recovery was less than \$50,000. Hence the averment in the complaint that the plaintiff was entitled to recover \$61,000 was incorrect, and if the complaint was insufficient upon its face,—which we need not and do not decide,—the overruling of the demurrer thereto was harmless. *State v. Julian*, 93 Ind. 292-295; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281.

Finally it is contended that the method of making the assessment was illegal, and that the result reached was arbitrary and uncertain, and not supported by competent evidence.

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The record discloses the following facts: During the thirty years' residence of the deceased, William P. Gallup, in Indianapolis, he had been a dealer in grain, in county and city bonds, and a lender of money on notes and mortgages, and for most of the time from 1881 to 1893 inclusive had been engaged in the business of banking, loaning money on mortgage securities, chiefly outside the county of his residence, and in investing in government and municipal bonds, and occasionally dealing in grain. It does not appear that at any time after 1880 he made or lost any large sum of money, or acquired any by gift or descent, or that his fortune in any way fluctuated in value or amount. That for the years 1881 to 1893, inclusive, he returned to the assessor of Marion county for taxation personal property amounting in the aggregate as follows: For the year 1881 \$24,090; for the year 1882 \$20,630; for the year 1883 \$20,015; for the year 1884 \$18,720; for the year 1885 \$17,160; for the year 1886 \$15,740; for the year 1887 \$13,845; for the year 1888 \$14,475; for the year 1889 \$16,475; for the year 1890 \$16,745; for the year 1891 \$18,180; for the year 1892 \$19,490; for the year 1893 \$20,560. That at the time of of his death, in December, 1893, he left a personal estate appraised and of the value of \$492,628.26, consisting principally of stocks, bonds, notes, and mortgages, including government bonds appraised at \$43,600, bank stock appraised at \$65,152.50, and household goods, live stock, and other articles appraised at \$1,500; that his brother, Edward P. Gallup, qualified as executor on the 4th day of January, 1894, and in the spring following, as such executor, returned to the assessor of Marion county taxable personal property belonging to said estate amounting to \$383,906.46 consisting of stocks, bonds, and notes, household goods, horses, harness and carriage; that within two months after his appointment, to wit, February 27, 1894, appellant, as executor, paid to the treasurer of Marion county, on account of omitted taxes, for the years 1893, 1892, and 1891, the sum of \$5,750,

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without any previous assessment of omitted property having been made or reported to the auditor or placed upon either duplicate; that for many years Edward P. had been a resident of Marion county, engaged in business with his brother, William P., and since his removal to New Hampshire a frequent visitor to his brother William, and for many years and to the present, a joint owner with the deceased of valuable real estate in Indianapolis; that the deceased was never married, and by his will gives his entire fortune to appellant, except \$4,500, and some trifling charges; that the relations between the brothers were close and intimate. Edward P. testified before the auditor that his brother had kept no books or record of his business, to his knowledge, except possibly a meager account upon five cent memorandum books that disclosed no important information, and which he had not deemed of sufficient importance to preserve, and did not now have any of them; that prior to his brother's death he did not have any knowledge or information about his brother's estate in character or amount; that, twenty years before, his brother might have told him what he had, but he had forgotten the amount stated, and though requested and urged by the auditor to furnish data and information, he declared his inability to do either.

With the facts before him the auditor proceeded to make an assessment of omitted property, by taking the amount of taxable personal property returned by the executor in the spring of 1894 as a basis. From the amount thus returned, namely, \$383,905, he deducted five per cent. as the probable net annual increase, and the result thus reached he took as the true amount for 1892, and from this amount he deducted a like five per cent., and took the result for the correct amount for 1891, and so on, back to 1881, deducting also from each result the amount returned by the deceased for that year. He also credited the estate by the \$5,750 paid by the executor in February, 1894, by deducting \$150,000 from the total assessment for 1893, \$100,000 from 1892,

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and \$100,000 from 1891, the rate of taxation for these several years, counted upon these several sums, producing the amount of \$5,750. The assessment of omitted property thus made by the auditor was: For the year 1881 \$171,010; for the year 1882 \$184,575; for the year 1883 \$195,995; for the year 1884 \$208,657; for the year 1885 \$222,184; for the year 1886 \$236,201; for the year 1887 \$251,356; for the year 1888 \$264,683; for the year 1889 \$277,365; for the year 1890 \$292,560; for the year 1891 \$207,404; for the year 1892 \$223,230; for the year 1893 \$190,880.

The auditor concedes that the result reached by him was, in a measure, an arbitrary deduction from facts of record and recognized rules of business, and that he had no positive evidence before him that the amounts stated by him were entirely accurate. But this is not sufficient to overthrow the judgment. Tribunals are not infrequently called upon to determine questions of fact upon evidence as unsatisfactory as that before the auditor. The fact that there had been an omission to list all of his property for taxation, we think, was well established, beyond peradventure. For the thirteen years covered by this suit the amount listed by the decedent was about the same for each year,—a little more in 1881 than in any subsequent year. In April, 1893, he gave to the assessor, as being all of his taxable personal estate, \$20,560. Upon his death, nine months later, his personal property is shown to be \$492,628 in value, \$383,906 of which, a few months later, was listed by the executor as taxable property, composed chiefly of municipal bonds and notes secured by mortgage, some running back in date to 1885. The executor, in his testimony before the auditor, estimated that these securities would average six per cent. interest. The reluctance manifested by the executor to assist the auditor in arriving at true results is to be deplored. And it is not apparent from his testimony why he deemed it proper, within two months after his appointment, and before any controversy had arisen over omitted property, and

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before any had been assessed or placed upon the duplicate, to voluntarily pay to the treasurer, on account of omitted property, \$5,750. What was the source of the information that prompted him to act? According to his testimony, he knew nothing whatever about his brother's estate prior to his death, and no records or books had come to his knowledge to furnish such information. It is most extraordinary that so large an estate, invested chiefly in county and city bonds, notes and mortgages, embracing a large number of items, with interest and principal maturing on many different dates, could be successfully managed without the use of records; and if, by this departure of the decedent from the ordinary methods of business, and his strange reserve in his intercourse with his most trusted brother and chief beneficiary, he kept the amount and character of his estate in previous years concealed, with the probable purpose of escaping taxation, when it is affirmatively shown that a large portion thereof did so escape, his representative is not in a situation to demand strict proof. The payment by appellant of the \$5,750, as taxes, was confession that property liable to taxation had been previously omitted, and, considered with the other facts disclosed by the public records, made a *prima facie* case, and justified the auditor in finding the existence of omitted property. This fact once established, in the ascertainment of the amount the auditor was warranted, in the absence of better evidence, in considering the rate of interest carried by the securities on hand, and that usually borne by such securities and investments as the evidence showed the deceased had been dealing in for many years, the general character of the decedent's business, the absence of any evidence of unusual or great gain or loss during the controverted period, the amounts given in by the decedent for taxation in each year, and, from all these facts and data, assessing such reasonable amounts as were warranted thereby. *Saint v. Welsh*, 141 Ind. 382.

The assessment made by the auditor is presumed, in this

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proceeding by the treasurer, to be correct, and must stand if not overthrown by a preponderance of the evidence. Section 8642 Burns 1894; *Buck v. Miller*, 147 Ind. 586, 599. We are not convinced that a preponderance of the evidence is with the appellant.

It follows that appellant is not entitled to a reversal.

Appellee, however, insists that the judgment should be reversed for errors of the court, upon which he has made a proper cross-assignment. Three points are made upon the cross-assignment complained of, namely: (1) That the court below erred in allowing appellant a double credit for the sum of \$5,750 voluntarily paid by him to the treasurer of Marion county on account of omitted taxes for the years 1891, 1892, and 1893, before any assessment of omitted property had been made, or attempted, by any authorized officer. (2) That the court erred in disallowing, as against the taxes on the omitted property assessed and placed upon the duplicates by the county auditor for the several years from 1881 to 1893, inclusive, the penalty provided by law for the nonpayment of taxes. (3) That the court erred in disallowing interest on the taxes against the several amounts assessed as omitted property from the date the several delinquencies would have occurred if the property had been duly and timely listed by the decedent.

In respect to the first point, it clearly appears, both from the evidence and special finding, that the county auditor, having first determined the amount of taxable property that had been omitted by the decedent for each of the years from 1881 to 1893, inclusive, deducted from the amount so found for the year 1893 \$150,000, and for each of the years 1892 and 1891 \$100,000, the said sums computed by the tax rate for the three several years, producing the aggregate of of \$5,750, the amount theretofore voluntarily paid by appellant on account of omitted property; and that there was in fact placed upon the duplicates for taxation only the balance for each of said years remaining after these deductions

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had been made. These deductions were evidently made by the auditor on the theory that the taxes on these sums, for these years, had been paid, and, for that reason, and to that extent, there was, when he came to make the assessment, no omitted property. And this was right. Therefore, assuming that the auditor's method of assessment was legal, it is apparent that the estate was fully credited by him with the \$5,750, by a reduction of the taxable amount shown by his calculations, of a sum that would produce the amount of the credit at the tax rate of the several years specified. And surely this was all the estate is entitled to.

The sixth specification of the special finding is to the effect that, after the death of William P. Gallup, his executor, Edward Gallup, in February, 1894, paid to the then treasurer of Marion county, on account of omitted taxes, the sum of \$5,750, and no more; and that, prior to such payment, no assessment of omitted property had been made by any authorized officer, nor had any such assessment ever been reported to the auditor, or entered upon the records; and, by the tenth, it is found "that said William P. Gallup, in addition to the property that had been returned by him for taxation, *and in addition, also, to the property* for and on account of which the taxes had been, as aforesaid, paid by said Gallup, as executor, to the treasurer of Marion county", was the owner of moneys, bonds, etc., amounting, in 1891. to \$207,404, in 1892 to \$223,230, and in 1893 to \$190,880; "and that the taxes due and owing by said William P. Gallup upon said omitted property so owned and held by him, during the years 1881 to 1893, inclusive, so charged upon the tax duplicates by the auditor, exclusive of all interest and penalties provided by law, by reason of failure to pay the first instalment thereof", amounts, in the aggregate, to the sum of \$52,746.69, "subject, however, to a credit of \$5,750, being the amount paid to the treasurer of Marion county, as hereinbefore in finding number six stated, leaving the net balance, due and owing, the sum of \$46,996.69." And the

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fourth conclusion of law is as follows: "Said Gallup, as such executor, is entitled to a credit upon the taxes levied upon the omitted property, aggregating \$52,746.69, of \$5,750, by reason of the payment of that sum to the treasurer of Marion county, on account of omitted taxes, and *this, notwithstanding the fact* that in making the assessment of said omitted property the auditor had allowed to said defendant, in ascertaining and determining the amount of said omitted property, a credit for said sum of \$5,750."

We do not perceive the ground upon which this conclusion can be sustained. It expressly asserts that appellant is entitled to the double credit. If the auditor's method of assessment, as shown in this opinion, and as adopted by the trial court, was legal, the result correctly reached should be accepted *in toto*. If the method was illegal, it should have been rejected altogether. We know of no principle of law or rule of procedure that will allow a court, in determining a question of right, to ameliorate the harshness of a judgment by an unwarranted reduction, or by the arbitrary allowance of dual credits. There is no force in the suggestion that credits can only be applied to liquidated demands, and that there existed no basis for credit until the omitted property had been legally assessed and placed upon the tax duplicates, for it must be borne in mind that the executor's payment to the treasurer was eleven months before the auditor entered upon this proceeding to assess omitted property; and if at the time of payment it was tendered by the executor, and accepted by the treasurer as a payment upon taxes owing, but unliquidated, against omitted property of the estate, there can exist no reason why it should not be applied in discharging such property *pro tanto*, and, so far as thus discharged, there remained no ground for its assessment as omitted property. As we have held the auditor's method of assessment was legal, and his allowance of credit to the estate for the \$5,750 was all the estate is entitled to, the second credit therefor, by the trial court, was erroneous.

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We will consider the second and third propositions together. A tax is not an ordinary debt. It is not founded upon contract, express or implied. It flows from the exercise of sovereign power, and is imposed without the consent of the debtor. It is enforceable summarily, by distress and sale, and without exemption or relief from valuation laws. The right to assess property and levy taxes thereon is given by legislative enactment, upon such limitations and conditions as are imposed by the Constitution. *State v. Halter*, 149 Ind. 292, 297. The right to tax and terms of its exercise are therefore inseparable. Furthermore, penalties are not favorites of the law, and can not be granted by implication. We must then find an express warrant in the statute, or deny the contention.

Fourteen sections of the taxation act of 1891 are pointed out as containing the words "taxes, penalties, and interest", "taxes, penalties, interest, and costs", or other words and phrases of similar import, from which it is claimed by appellee that the manifest intention of the legislature was that penalties and interest should be collected in cases like this. The claim has no force, for failure to point to any such words or phrases used in connection with the act of assessment of omitted property by the county assessor, auditor, or treasurer. Section 8531 Burns 1894, provides that when the county assessor shall discover omitted property, he shall list it upon the proper assessor's book in the auditor's office, and the same shall be placed upon the duplicates by the auditor, and the taxes thereon extended and collected as in other cases. By section 8560, when the auditor shall discover such unassessed property he shall proceed to correct the duplicates, and add such property thereto, with the proper valuation, and charge such property, and the owner thereof, with the proper amount of taxes thereon. By section 8600, when the treasurer makes such discovery he shall report the fact to the auditor, whose duty it shall be to correct the duplicates, by adding thereto the assessed valuation of such property.

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And the treasurer shall then collect the taxes thereon in the same manner as if assessed by the assessor. In neither of these sections is the officer directed or permitted to add penalty or interest, or do anything more than place the property upon the duplicates, assess its taxable value, extend the taxes against the same, and proceed to collect them as other taxes are collected. Section 8570 provides for voluntary payments, and for the assessment of all the penalties and interest known to the taxation act. It provides that "Any person or taxpayer, charged with taxes on the tax duplicate in the hands of a county treasurer may pay the full amount of such taxes on or before the third Monday in April, or may, at his option, pay the first instalment on or before such third Monday, and the remaining instalments on or before the first Monday of November following; * * * And, provided, further, that in all cases where the first instalment shall not be paid on or before the third Monday in April, the whole amount unpaid shall become due, and be returned delinquent and collected as provided by law, and there shall be a penalty added of ten per cent. upon the amount of any instalment not paid when due, which the persons or property assessed shall pay, together with cost of collection, and, if such taxes remain delinquent at the succeeding first Monday in November, there shall be a penalty of six per centum added to all such taxes that become delinquent at the preceding April and November settlements, and a penalty of ten per centum only shall be added to the current delinquency occurring on the first Monday in November."

In no instance is a penalty assessable, except in default of payment of taxes, when due (under §8570, *supra*), that have been legally assessed and placed upon the tax duplicate in the hands of a county treasurer. As said in *County of Redwood v. Winona, etc., Co.*, 40 Minn. 512, 524, 42 N. W. 473: "One thing is very certain; that a penalty in any form can not be imposed until a party is in default in some legal duty. A penalty for the non-payment of a tax can not

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be imposed until the person has an opportunity to pay it, and fails to do so." It is a misnomer to call such a charge a delinquent tax. It was not a tax at all until after the assessment and extension were made. Before that time, the claim existed only in the right to tax; and not until molded by the form of law into a fixed charge was it susceptible of demand and exact payment. The assessment and charge may be made for any year, or any number of years, but whenever made it is to be placed and extended upon the current duplicates for collection as other taxes; so says the statute. No penalty is prescribed by the legislature for the failure of the taxpayer timely to list his property, and none can be imposed by the tax officer nor by the courts. *County of Redwood v. Winona, etc., Co., supra*; *Danforth v. McCook County*, 11 S. D. 258, 76 N. W. 940; *Elliott v. Philadelphia, etc., Co.*, 99 U. S. 573, 25 L. ed. 292; *State v. California, etc., Co.*, 13 Nev. 203. We have no doubt but penalties may follow the non-payment of such taxes after they reach the duplicates, as they attach to other taxes under §8570, *supra*, but our attention has been called to no other provision of the statute that imposes them. In respect to the addition of interest to the claim, this court has ruled that only the penalty and interest, called "penalty", provided in §8570, *supra*, can be imposed for delay in the payment of taxes. *Evansville, etc., R. Co. v. West*, 139 Ind. 254; *Western Union Tel. Co. v. State*, 146 Ind. 54, 60. See also *Western Union Tel. Co. v. State*, 55 Tex. 314; *State v. Duncan*, 3 Lea 679; *Kentucky Central R. Co. v. Pendleton Co.* (Ky.), 2 S. W. 176; *State v. Southwestern R. Co.*, 70 Ga. 1, 32.

For error of the court in allowing appellant a credit of \$5,750 upon the amount of appellee's recovery, the judgment must be reversed. Judgment reversed, with instructions to restate conclusions of law in accordance with this opinion, and render judgment thereon in favor of appellee for the sum of \$52,746.69; the same to draw interest from the date of the finding, to wit, October 31, 1898.

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THE PEORIA AND EASTERN RAILWAY COMPANY ET AL.
 v. THE ATTICA, COVINGTON AND SOUTHERN
 RAILWAY COMPANY.

[No. 18,871. Filed February 16, 1900.]

APPEAL AND ERROR.—*Complaint Challenged for First Time on Appeal.*—Where a complaint is first challenged on appeal, it will be held sufficient if each essential element of right of recovery is stated, even if so defectively as to make the complaint obnoxious to demurrer. *p. 221.*

TRESPASS.—*Injunction.*—*Complaint.*—*Averment as to Ownership of property*—A complaint in an action to enjoin defendant from trespassing upon certain described property, alleging that plaintiff purchased the property from the owner, and has ever since owned and occupied the same, is a sufficient averment of the kind and extent of plaintiff's title as against an objection made for the first time after judgment. *p. 221.*

SAME.—*Pleading.*—*Title to Property.*—A complaint in an action to enjoin defendants from trespassing upon canal property alleged to be owned by plaintiff, which discloses that defendants, since a time prior to the abandonment of the operation of the canal, have maintained a bridge over the property, does not amount to an admission of a superior title in defendants to the ground under the bridge. *pp. 221, 222.*

SAME.—*Injunction.*—*Complaint.*—*Railroads.*—A railroad company, having purchased a canal and constructed its tracks along the tow-path of same, may maintain an action to enjoin other railroad companies that had maintained a bridge over the canal from appropriating the tow-path under the bridge on an allegation that plaintiff was the owner and in possession of the land and space under the bridge, and that defendants, forcibly and without right, were attempting to appropriate the same permanently to their own use to the exclusion of plaintiff. *pp. 222, 223.*

SPECIAL FINDINGS.—*Railroads.*—*Right of Way.*—*Title.*—*Injunction.*—In an action by a railroad company to enjoin other companies from appropriating its right of way, a finding that the original owner of the land platted same, and the land in question appeared by the plat to be a street, does not overcome other findings showing plaintiff to be the owner in fee of the land, where it was not shown that the street was ever accepted by the public, and the street was never used, opened or improved, and could not be, on account of the topography of the place. *pp. 223-225.*

Peoria, etc., R. Co. v. Attica, etc., R. Co.

From the Fountain Circuit Court. *Affirmed in part and reversed in part.*

John T. Dye, B. K. Elliott and W. F. Elliott, for appellants.

W. V. Stuart, E. P. Hammond, D. W. Simms, E. P. Hammond, Jr., and C. M. McCabe, for appellee.

BAKER, J.—Suit by appellee for injunction. Complaint in one paragraph. Answer, general denial. Special finding of facts and conclusions of law. Judgment, perpetual injunction against defendants. Joint and several motions for new trial overruled. Separate errors assigned: The complaint does not state facts sufficient to constitute a cause of action; each conclusion of law is wrong; and the motions for new trial were erroneously overruled.

The defendants were: The Peoria and Eastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Indianapolis, Bloomington and Western Railroad Company; The Ohio, Indiana and Western Railway Company, E. A. Peck and J. A. Barnard. The first two companies and Barnard perfected a term-time appeal, and filed separate assignments. The I. B. & W. R. Co. has not appealed. The O. I. & W. R. Co. and Peck severally assigned errors under the act of 1895 (Acts 1895, p. 179); §638a Horner 1897, §647a Burns Supp. As there was no evidence against these last two defendants, they may at once be dismissed from consideration.

The complaint was filed in February, 1892. It charges in substance that the P. & E. is the owner and the C. C. C. & St. L. is lessee of a line of railroad through Covington, in Fountain county, of which Barnard is superintendent; that defendants built their line sometime prior to September, 1872; that in doing so they carried their line over the Wabash and Erie Canal, where the canal was located on and adjacent to part of out lot one of the town, by means of a trestle or bridge about sixteen feet above the tow-path of the

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canal; that the canal ceased to be operated about September, 1872; that the bridge ever since has been maintained practically as first built; that it rests partly on, and in places is supported by piles driven in, what was canal property; that in 1880 plaintiff purchased from the owners of the property of the Wabash and Erie Canal all of the canal property in Fountain county including the part where the canal was crossed by defendants' bridge, and afterwards constructed its railroad on the tow-path under the bridge that constituted the road-bed of defendants, from the north to a point fifty feet south of the bridge; that for twelve years last past plaintiff has been in actual ownership, control and occupancy of its road on the tow-path under the bridge; that in 1882 plaintiff notified defendants in writing that it had purchased and was the exclusive owner of the canal property, including the part under the bridge, and would build and operate its road thereon; that defendants never controverted this claim nor attempted to interfere with plaintiff's possession until the doing of the acts herein complained of; that plaintiff built its track under the bridge, with the knowledge and acquiescence of defendants; that, although defendants have used, repaired and controlled the structure as located in the air, none of them has any claim of ownership to the land or space under the bridge or on either side thereof, but the ownership and occupancy have been continuously in plaintiff and its predecessors in title, and on the faith thereof plaintiff has expended large sums of money; that defendants, forcibly and without right, are threatening and attempting to seize and appropriate permanently to their use plaintiff's property under the bridge and to fill up the entire space with piling, ground and stone, and will continue, etc., unless restrained, etc.

There was no demurrer to the complaint. It will therefore be held sufficient if it states facts enough to bar another action. *Xenia, etc., Co. v. Macy*, 147 Ind. 568. The complaint comes here aided by the curative virtues of the find-

ing and judgment. If a complaint is tested by demurrer, all inferences and intendments are taken against the pleader. If a complaint is first challenged after judgment, all inferences and intendments are taken in favor of the pleader, and there must be a total failure to state some essential element of right of recovery to render the complaint insufficient. If each essential element is stated, even if so defectively as to make the complaint obnoxious to demurrer, the defects are cured by the verdict or finding.

The first objection urged against the complaint is that it fails to state the extent of appellee's estate in the land—whether in fee, or an easement, or a license. The allegation that "plaintiff is the owner", without stating the kind of title, has been held sufficient against demurrer. *Burt v. Bowles*, 69 Ind. 1; *Steeple v. Downing*, 60 Ind. 478. Appellee alleged that in 1880 it purchased the canal property from the then owner, and has ever since owned and occupied the land in question. Appellee's title and that of its predecessors is stated generally as an "ownership". This is not a total omission of an essential allegation, but is at most an indefinite and uncertain averment that will be deemed cured after judgment, if it needed such aid.

It is said next that the complaint affirmatively shows that appellants have a title to the land and space in controversy superior to appellee's. It is true that the complaint discloses that appellants, since a time prior to the abandonment of the operation of the canal, have maintained a bridge over the property; but the controversy related solely to the right to use the ground and sixteen feet of space under the bridge. Appellee in no way seeks to curtail the right of appellants to maintain their structure as originally erected. That right was not in issue. To concede that right, in view of the averments that appellee is owner and that appellants, forcibly and without right, are attempting permanently to occupy appellee's property, was no admission of any right in appellants to the ground and space in question. Appellants claim that

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a railroad company, because it is chartered to build, maintain and operate a railroad, has the right to change the character of its road-bed at will wherever it has established a foot in possession, to the extent of holding the utmost it could acquire in any case; and cite *Indianapolis, etc., R. Co. v. Rayl*, 69 Ind. 424, *Prather v. Western Union Tel. Co.*, 89 Ind. 501, and *Campbell v. Indianapolis, etc., R. Co.*, 110 Ind. 490. If the cases support the contention, they are in conflict with the later decisions. *Fort Wayne, etc., R. Co. v. Sherry*, 126 Ind. 334, 10 L. R. A. 48, and the authorities therein collated. But in *Indianapolis, etc., R. Co. v. Reynolds*, 116 Ind. 356, it was said of the three cases in question: "We entertain a different view of these decisions. They decide, in effect, that where a railroad company enters upon land and takes possession of, and occupies a right of way of the full width authorized by law, or by its charter, no limitation upon its right to do so appearing, it will be conclusively presumed that it appropriated the lands so occupied or taken possession of to the full width allowed by law." Here, the entry was upon the lands of a public canal, and the only authorized purpose was to carry the track across the canal property in such a manner as not to interfere therewith. Clause 5 of §3903 R. S. 1881 and Horner 1897, §5153 Burns 1894. The possession taken under that right was limited to the erection of the bridge. And such possession was evidence of the canal proprietor's concession of right to that extent, but no greater. *Jones v. Erie, etc., R. Co.*, 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 916. The canal proprietor's estate was servient to appellants' easement as so acquired, and the bridge was notice of that fact and nothing more. This disclosure of appellants' right to maintain the bridge does not touch, much less destroy, the averments that appellee and its predecessors have always owned and occupied the ground and space under the bridge.

It is finally insisted that the complaint is insufficient to warrant an injunction. The particular claim seems to be

that the theory of appellee's complaint is that appellee is entitled to an injunction to protect its railroad track, crossing under appellants' track, and that if appellee has no right to a railroad crossing, it has no right to an injunction. Appellants assert that appellee, to secure the right to a crossing, "was bound to proceed under the statute". Not so. If appellants had any title to or interest in the land and space taken possession of by appellee, they might acquiesce in appellee's proceeding in disregard of the statute, and might be estopped from questioning appellee's right if large expenditures had been made upon the faith of such acquiescence. But appellants had no rights in the ground and space used by appellee. Therefore, this was not a railroad-crossing case. On the allegations that appellee was the owner and in possession of the land and space under the bridge, and that appellants, forcibly and without right, were attempting to appropriate the same permanently to their own use, to the exclusion of appellee, the legal theory of the complaint is that a landowner is entitled to have an intermeddler restrained from erecting a permanent obstruction on his property. That a landowner, under such circumstances, may maintain injunction, is clear. *Indiana, etc., R. Co. v. Allen*, 113 Ind. 581; *Xenia, etc., Co. v. Macy*, 147 Ind. 568. The intermeddler has no right to inquire, and it is entirely gratuitous for the landowner to state, how he is using or intends to use his own property.

What has been said concerning the sufficiency of the complaint disposes of nearly all the questions made on the special finding. The finding shows that the proprietor of the land platted an addition of out lots in 1845. On the plat was marked a street running east and west along the north side of out lot numbered one. The street has never been used, opened or improved, and can not be on account of the topography of the place, but has never been vacated. In 1846 the Wabash and Erie Canal was constructed across this platted street and out lot one from north to south. In 1870

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remedy of one holding property under bill of sale from the judgment debtor to prevent a sale of the property on execution, where the property after levy was left in the possession of plaintiff without any bond, undertaking, or agreement for the return of the property. pp. 229, 230.

From the Tipton Circuit Court. *Affirmed.*

I. W. Christian, W. S. Christian and R. B. Beauchamp,
for appellants.

A. F. Shirts, L. S. Baldwin, S. D. Stuart and C. G.
Reugan, for appellee.

MONKS, J.—This action was brought by appellee against appellants to enjoin the sale of certain personal property on execution. The court made a special finding of facts, and stated conclusions of law thereon in favor of appellee, and judgment was rendered thereon enjoining the sale of said personal property.

The errors assigned, and not waived by a failure to argue the same, are: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in its conclusions of law. It is not necessary to consider the first error assigned, for the reason that the same questions are also presented by the second.

It appears from the special finding that on August 4, 1897, one Jerry Klotz executed his promissory note to a bank in Noblesville, payable in sixty days from date, for a loan of \$600, with appellee, Gascho, as surety, and at the same time he executed a bill of sale to said Gascho on twelve head of mules, to secure the latter from loss on account of said suretyship. When said note became due, Klotz and Gascho executed another note for the same amount, and the first note was canceled. Before said renewal note fell due, Klotz became insolvent, and on November 29, 1897, sold, by a bill of sale in writing, said twelve head of mules to Gascho, who assumed the payment of the said note for \$600, as the purchase price for said mules, and paid the same when it fell due, in accordance with said agreement. The mules were delivered to said Gascho on November 30, 1897,

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and he, on the same day, removed them to his premises, where they have ever since remained. Neither one of said bills of sale was ever acknowledged before any officer, or ever recorded. On December 3, 1897, appellants, Worman, Chamberlain, Black, and Davis, recovered judgment in the Howard Circuit Court against said Klotz, for \$1,632.20, on which there was paid \$716.98 December 15, 1897. Said appellee, Gascho, was not a party to said judgment, and was in no way bound for its payment, or any part thereof. Afterwards appellant, James A. Owens, as sheriff of Hamilton county, levied an execution, duly issued on said judgment, on said twelve mules as the property of said Klotz. All of said mules were in the possession of appellee when said levy was made, and were duly appraised at \$630 and advertised for sale by said sheriff on December 31, 1897. On December 23, 1897, appellee obtained a temporary restraining order against said sheriff, which prevented the sale of said property as advertised. The reasonable value of said mules when sold to said appellee was \$800. Mules sell most readily and for a better price in the market at five years of age and older, and said mules at the time of the sale as advertised by the sheriff were only from two to four years old, and were not of sufficient age to sell most readily, and for the best price in the market. Said mules are now, and were on December 3, 1897, owned by appellee, and he had prepared and had in store a sufficient amount of clover hay and corn to feed them until the next spring, when they could have been sold for better prices and to a better advantage to him. At the time of the levy by the sheriff said mules were in the possession of appellee, and said officer took possession of said mules, but did not remove them from the premises of appellee, and did not take or require any receipt or bond from appellee, or any other person, for the safe-keeping of said mules and the return of the same when demanded. The sheriff informed appellee that he would leave said mules in his possession until sold under said levy.

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The mules have ever since said day remained in the stable of, and on the premises of, appellee, where they were when the levy was made.

Klotz, although insolvent, had the right to prefer and save harmless appellee as his surety, and unless the sale of said mules was made with the fraudulent intent and purpose to cheat, hinder, and delay the creditors of said Klotz, and appellee had knowledge of such intent, it cannot be set aside. *Rownd v. State*, 152 Ind. 39; *Levering v. Bimel*, 146 Ind. 545; *Straight v. Roberts*, 126 Ind. 383; *Gilbert v. McCorkle*, 110 Ind. 215; *Wooters v. Osborn*, 77 Ind. 513. There is no finding that said sale was made for such purpose, or that it was fraudulent and void for any reason. Fraud is not presumed, but must be proved, and, where it is essential to a recovery or defense, it must, where there is a special finding or special verdict, be found as a fact. *Morgan v. Worden*, 145 Ind. 600, 603, and cases cited; *Parks v. Satterthwaite*, 132 Ind. 411; *Fulp v. Beaver*, 136 Ind. 319. The finding that the mules were sold to appellee for \$200 less than their value, at a time when Klotz was insolvent, is not equivalent to a finding that said sale was fraudulent and void. This was only a fact which the trial court had the right to consider with all the other facts in evidence in determining the ultimate fact whether or not said sale was fraudulent. Appellee's title did not depend upon the bill of sale executed August 4, 1897, to indemnify him from loss as security for Klotz, but upon the sale and delivery of said property to him in December, 1897; it is not material, therefore, whether or not the same was acknowledged and recorded, as required by §6638 Burns 1894, §4913 Horner 1897. The law did not require that the written agreement evidencing the sale of the mules, executed December 3, 1897, be either acknowledged or recorded; said agreement was not, therefore, rendered fraudulent or void for that reason. It is expressly found by the court that appellee purchased the personal property in controversy of Klotz, and

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was the owner thereof before the execution was issued on said judgment; the execution was not, therefore, a lien on said property, and the levy of the execution thereon was wholly unauthorized.

It is insisted by appellants that appellee was not entitled to an injunction, for the reason that he had a complete and adequate remedy at law, under §§1286, 1287 Burns 1894, §§1266, 1267 Horner 1897, by an action in replevin. It is provided by §1286 (1266), *supra*, that when any personal property taken on execution is claimed by any person other than the defendant, the owner may bring an action for the possession thereof. It was said by this court, however, in the *Standard Oil Co. v. Bretz*, 98 Ind. 231 on p. 232, "The action for replevin cannot be maintained unless the evidence shows that the defendant at the time of the commencement of the suit was in the actual or constructive possession of the property. *Krug v. Herod*, 69 Ind. 78; *Louthain v. Fitzer*, 78 Ind. 449." In Wells on Replevin §142, it is said: "Where the defendant was an officer who had levied on property, but did not remove it, the defendant in the execution who still retained the goods, will not be permitted to sustain replevin against the officer, as the possession was still in himself [*Hickey v. Hinsdale*, 12 Mich. 100.]; but when an officer levies on goods, and takes an inventory, and directs a receptor to prevent their removal, he has a sufficient possession to enable the owner to sustain replevin. [*Fonda v. VanHorn*, 15 Wend. 632.] And such a taking is sufficient ground on which to base an action against the officer." This statement of the law is cited and approved in *Louthain v. Fitzer*, *supra*, and in the *Standard Oil Co. v. Bretz*, *supra*. See also *Bacon v. Davis*, 30 Mich. 157.

It will be observed that while the court found that the sheriff took possession of the mules when he made the levy, it is also shown by the finding that he did not remove them from the premises of appellee, where they were when the levy was made, but that they remained in the possession of appellee in his stable and on his premises from the time the

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levy was made until the commencement of this action, and that no bond, undertaking, or receipt was demanded or received from appellee, or any other person, for the safe-keeping and return of said mules when called for by the sheriff. Under such circumstances, appellee, and not the sheriff, had possession of said mules when this action was commenced (*Standard Oil Co. v. Bretz, supra*); and, under the authorities cited, appellee could not maintain replevin. If appellee had given a receipt, bond, or other undertaking, to the sheriff, or, it may be, if appellee had orally agreed that he would keep the mules for the sheriff, as his agent, and return them to him on demand, the constructive possession would have been in the sheriff. *Hadley v. Hadley*, 82 Ind. 95, 99.

As, under the facts found, appellee could not have maintained replevin, it is not necessary to determine whether or not the remedy of replevin under our statutes is as plain, adequate, practical, and efficient, to the ends of justice and its prompt administration, as the remedy by injunction.

Judgment affirmed.

MUELLER v. THE STINESVILLE AND BLOOMINGTON
STONE COMPANY ET AL.

[No. 18,933. Filed February 20, 1900.]

APPEAL AND ERROR.—Parties.—An insolvent corporation is not a necessary party to an appeal involving only the question of the distribution among creditors of the funds arising from the sale of the property of the corporation. *pp. 233, 234.*

RECEIVERS.—Sale of Mortgaged Property.—Transfer of Liens.—Priorities.—Where, after rendering judgment and decree foreclosing mortgages, the court ordered the mortgaged property sold by a receiver without specifically directing that the property should be sold to pay off the adjudged liens, the liens are extinguished in the property, and transferred to the fund arising therefrom, and the allowance of a claim not shown to be entitled to priority, filed by an intervener after the receiver's sale, in preference to the adjudicated liens, was erroneous, although the adjudged lienors did not file claims with the receiver after the sale. *pp. 234, 235.*

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From the Monroe Circuit Court. *Reversed.*

T. J. Loudon and J. H. Loudon, for appellant.

H. C. Duncan, I. C. Batman and W. M. Loudon, for appellees.

HADLEY, C. J.—The First National Bank of Bloomington brought foreclosure against Malone and Pickel, makers of the note and mortgage, the Stinesville Stone Company, as purchaser of the mortgaged premises, and Mueller, the appellant, as a junior mortgagee of the Stone Company.

Upon motion of the plaintiff, William M. Loudon was appointed a receiver, and ordered to take charge of and preserve the mortgaged property. Mueller filed a cross-complaint to foreclose his mortgage, making defendants thereto his codefendants and the plaintiff. The defendants, to each the complaint and cross-complaint, made default, and on June 21, 1897, judgment and decree were given in favor of the plaintiff bank for \$7,933, as a first, and in favor of the cross-complainant, Mueller, for \$16,905, as a second, lien, and the property ordered sold by the sheriff, and the proceeds applied—First, to the payment of the costs; second, to the payment of the bank's judgment; third, to the payment of Mueller's judgment; fourth, the balance to be paid into court for further orders. On the day following the entry of the decree of foreclosure, upon his application, the court ordered the mortgaged property sold by the receiver, the order reciting, among other things, that the plaintiff bank and cross-complainant Mueller had some interest therein. On July 22, 1897, the receiver sold the property for \$9,600, in accordance with the order of sale. On September 27, 1897, appellee, the Stinesville & Bloomington Stone Company, came into said foreclosure proceeding, and applied for permission to prosecute a suit "on an account" against the defendant, Stinesville Stone Company, and Loudon, receiver thereof, which leave was granted, and the claim allowed against the receiver for \$397.49. No special lien

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or equity in the property of the Stinesville Stone Company was asserted or alleged by the intervener, as appears from the record, and the judgment in his favor was a general allowance against the receiver. On October 15th, the receiver made a report of sale of the mortgaged property, which sale was confirmed, and the receiver ordered to execute to the purchaser a deed of conveyance upon full payment of the purchase money. On November 4, 1897, the receiver was ordered by the court to, and did, give two weeks' notice, by publication, to creditors of the Stinesville Stone Company to file their claims on or before the first day of the next term of court, to begin on the second Monday of January, 1898. On January 22, 1898, the receiver reported to the court full payment of the purchase money, and that he had on hands, principal and interest, \$9,744, which the court ordered paid to the clerk for further orders of the court. On January 24, 1898, the receiver filed his account of receipts and disbursements, showing a balance for distribution of \$9,678, which report was approved, and the receiver discharged; whereupon the appellee, the Stinesville & Bloomington Stone Company, the First National Bank of Bloomington, and appellant, Mueller, each filed a separate petition and motion for distribution of the fund in court, arising from the sale of the mortgaged property.

The motion of the Stone Company recited the various proceedings of the foreclosure, and the rendition of the several judgments and decrees in favor of the plaintiff bank and cross-complainant, Mueller, and the order of liens and payment that should be observed by the sheriff. It also recited the order of sale granted to the receiver, and averred "that in said order of sale there was no order whatever for the distribution or application of the fund derived from said sale; nor did either the said Mueller or the said plaintiff bank appear to or in any way answer said petition; and there was no order of said court of any kind fixing or determining their rights in said real estate, or said property or

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dered sold, or in any way fixing or determining their liens, or from what fund they should be paid"; that notice was given, under the order of the court, for creditors of the Stinesville Stone Company to file their claims on or before the January term, 1898; that the petitioner had, upon leave granted, prosecuted a claim against the receiver, and was allowed the sum of \$397.49, payable out of funds in his hands applicable thereto; that since said notice to creditors, the petitioner's claim is the only one that has been filed against the receiver; that neither the plaintiff bank nor the cross-complainant, Mueller, had filed any claim since the making of said order to creditors. Prayer, that the clerk be ordered to pay its claim in full, to wit, \$405, from the funds in his hands. The petitions or motions of the bank and Mueller asked that after payment of costs, fees, and expenses of the receiver, the bank and Mueller be next paid in the order named, in accordance with the decree of foreclosure. The court sustained the motion of the Stinesville & Bloomington Stone Company, and ordered distribution as follows: (1) To pay the costs of this proceeding; (2) to Loudon, receiver, for services, \$350; (3) to Loudon & Loudon, attorneys for receiver, \$300; (4) to the Stinesville & Bloomington Stone Company its claim of \$403.25; (5) to the First National Bank of Bloomington, the amount of its judgment, \$8,216.26; (6) the residue to Mueller on his judgment for \$16,900. Mueller properly reserved exceptions to the sustaining of the motion of the Stinesville & Bloomington Stone Company, and to the order of distribution made thereon, and upon these exceptions, he prosecutes this appeal.

We are first confronted with a motion by appellees to dismiss the appeal under rule six, on the ground that the assignment of errors does not contain the name of the Stinesville Stone Company. This company was a defendant to the action, was a judgment debtor, was largely insolvent, and a receiver was appointed to take charge of all its property, which was afterwards sold under the order of the court;

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and the only question involved in this appeal arises upon the distribution among its creditors of the fund accruing from the sale. The company has no possible interest in the issue here presented and, hence, is not a necessary party to the appeal or assignment of errors. *Alexander v. Gill*, 130 Ind. 485; *Hogan v. Robinson*, 94 Ind. 138; *Lowe v. Turpie*, 147 Ind. 652, 692, 37 L. R. A. 233.

The real question is: Did the court err in its order of distribution by directing the payment of the general claim of the Stinesville & Bloomington Stone Company in preference to the adjudicated specific lien of appellant? We think it did. The Stinesville & Bloomington Stone Company was not a party to the action when the receiver was appointed, and when the foreclosure decree was entered in favor of the bank and appellant, Mueller, and hence, it was not concluded by the adjudication. But when it came into the case, and asserted its claim against the estate in the hands of the receiver, it was bound to take notice of all the steps that had been taken in the action to which it had become a party, and was bound to know that the court had adjudged liens in favor of the plaintiff bank and cross-complainant, Mueller, and against the property of the common debtor in the hands of the receiver. Appellees' judgment was rendered by the same court and in the same action in which appellant's was rendered, and had relation to the same source of payment. And the court, having sequestered the common insolvent debtor's property for distribution among the creditors, must proceed in such a way as will preserve the priorities and equities, as they existed when the receiver was appointed, of all creditors, whether regular parties to the cause, or only parties in interest coming before the court in seasonable time to establish their claims. So, in this case, when the mortgaged property was sold, and the proceeds brought into court, it was still the mortgaged property in another form and impressed with all the priorities and equities that had been judicially declared against it, and sale and

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distribution among the creditors should have been made accordingly. High on Rec., §5; *Beverley v. Brooke*, 4 Gratt. 187. Sitting as a court of equity with the property in its possession, the court had the undoubted authority, even after authorizing the sheriff to sell the property, to practically nullify the sheriff's authority by directing its receiver to make the sale, if it appeared that a sale by the receiver would be to the best interests of the creditors as a class. *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 622; High on Rec., §192.

The contention of appellee, that, because in its order of sale to the receiver the court did not specifically direct that the property should be sold to pay off the adjudged liens, or free from liens, it must be held as having been sold subject thereto, and the lienors driven to the property in the hands of the purchaser for their remedy, can not be accepted, so far as it applies to parties to the action. When a court of equity has taken possession of property for administration for the benefit of creditors, and claimants thereto have come before the court with their pretensions and had their priorities and equities judicially determined, and a sale is ordered to carry out the equitable conclusions, by the sale thus made the liens of all parties to the action are extinguished in the property, and transferred to the fund arising therefrom. In the final distribution of this fund among the creditors, who have come into the case at any stage of the proceeding, in respect of priorities, the court will be governed by established principles, keeping in view that the superior rights and equities of creditors are to be preserved in the fund to the same extent that they existed in the property sold. It does not appear, by appellee's motion nor by the record, that it is entitled to priority in the distribution of the fund; and its motion was therefore improperly sustained.

Judgment reversed, and cause remanded, with instructions to overrule appellee's, the Stinesville & Bloomington Stone Company's motion for distribution, and for further proceedings in accordance with this opinion.

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SARBER v. RANKIN, TREASURER, ET AL.

[No. 18,727. Filed February 21, 1900.]

DRAINS.—Statutes.—Amendment.—Where a drainage petition was filed prior to the date of the amendment of §4286 R. S. 1881, but no action was taken thereon until after the amendatory act took effect, the proceeding was properly had under the amendatory act. *p. 238.*

SAME.—Viewers.—Extension of Time in which to Make Report.—A drainage proceeding is not rendered void by reason of the fact that the viewers asked and obtained two extensions of time in which to make and file their report. *p. 239.*

SAME.—Irregularities in Acceptance.—An assessment for a drain will not be enjoined on account of mere irregularities in the acceptance of the work, where it does not appear that plaintiff did not receive all of the benefits he would have received if the work had been accepted in the manner claimed by him to be proper. *p. 240.*

SAME.—Assessments.—Notice.—Injunction.—Complaint.—An allegation in a complaint to enjoin a drainage assessment that plaintiff had no notice of the time set for the hearing of the petition and report of viewers is insufficient in the absence of an averment that the constructive notice provided by statute was not given, since a personal notice is not required. *p. 240.*

SAME.—Assessments.—Collection.—Injunction.—The fact that a drain was not completed according to the terms of the contract is not sufficient ground for enjoining the collection of an assessment, since the property owner had a legal remedy. *p. 241.*

SAME.—Joint Drains.—Manner of Procedure.—Injunction.—The collection of an assessment for a drain constructed jointly by two counties will not be enjoined because the boards of commissioners of the two counties did not sit together and form themselves into one tribunal in acting on the petition, since if the boards adopted the wrong construction of the statute, it would amount to an erroneous exercise of power, not a usurpation. *pp. 241, 242.*

From the Fulton Circuit Court. *Affirmed.*

Charles P. Drummond and Charles Kellison, for appellant.

W. B. Hess, J. H. Brubaker, T. R. Marshall, W. F. McNaggy and P. H. Clugston, for appellees.

BAKER, J.—Suit by appellant against William Rankin,

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treasurer of Marshall county, to enjoin the collection of a drainage assessment and to have the lien declared void. Appellees Pollard, Goff and Foohey, owners of the lien, on their application, were made parties defendant. Separate demurrers to each of the eight specifications of the complaint were sustained, except to the fourth. Answer in general denial and two affirmative paragraphs. Demurrer to second overruled, sustained to the third. Reply in general denial. Trial and finding for the defendants. Motion for a new trial overruled. Judgment for defendants. Exceptions by each party to each adverse ruling.

The errors assigned are: Sustaining the demurrers to each of the seven specifications of the complaint; overruling the demurrer to the second paragraph of answer to the fourth specification; overruling the motion for a new trial.

The ditch in question has its source in Kosciusko and its outlet in Marshall county. The complaint, after averring the filing of the petition in Kosciusko county and the appointment of viewers, the filing of the transcript before the commissioners of Marshall county and the appointment of viewers, the application of the joint viewers for extensions of time for filing report and the granting of the extensions, the filing of the report of the viewers, the hearing of the petition and report before the commissioners, the setting aside of the report and notice given, the making of an amended report by the viewers showing the assessment of plaintiff's land and the impracticability of allotting portions of the work to the several persons assessed, the hearing of the petition and the finding that the drain was of public utility and that notice had been given, the making of the final report, the notices of and the letting of the contract for construction to Pollard, Goff and Foohey, the assessment of plaintiff's land in Marshall county, the examination and acceptance of the drain by the surveyor of Kosciusko county, the issuance of certificates by the surveyor of Kosciusko county that the work had been completed and that the

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assessments were due and if not paid were to be collected as other taxes are collected, the delivery of the certificate to Pollard, Goff and Foohey, the refusal of plaintiff to pay the certificates, the issuance of duplicate certificates by the surveyor of Kosciusko county and the filing thereof with the auditor of Marshall county to be extended on the tax duplicate, the placing of the tax duplicate in the hands of Rankin, treasurer of Marshall county, who is threatening and intending to enforce collection,—and alleging that the sums so extended purport to be a lien and constitute a cloud upon plaintiff's title,—proceeds in eight specifications to state the reasons why the plaintiff should not be compelled to pay the assessments, and why they should be declared null and void.

Each specification, in connection with the general allegations preceding and following it, must be complete in itself as a separate paragraph of complaint. No specification can derive aid from another. *Mustard v. Hoppess*, 69 Ind. 324; *Hilton v. Mason*, 92 Ind. 157; *Scott v. Hansheer*, 94 Ind. 1; *Hill v. Probst*, 120 Ind. 528; *Jones v. Cullen*, 142 Ind. 335; *Raymond v. Wathen*, 142 Ind. 367.

The first and seventh specifications in substance allege that the proceedings are void for the reason that no allotments were made to plaintiff, but the contract for constructing plaintiff's portion of the drain was let to Pollard, Goff and Foohey, without giving plaintiff an opportunity to do the work. Appellant contends that the proceeding was governed by §4286 R. S. 1881, as the petition had been filed prior to the date of the amendment of the statute. Acts 1893, p. 329, §5656 Burns 1894, §4286 Horner 1897. The petition was filed in the commissioners' court of Kosciusko county on February 23, 1893. The amendatory act took effect March 4, 1893, before any action had been taken on the petition. After it took effect, this cause was governed by the provisions of the amendatory act. *Steele v. Empsom*, 142 Ind. 397. These specifications, taken in connection with the preceding allegation that the viewers reported that it was

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impracticable to make an allotment, show that the law was strictly followed and that the proceeding was regular in this regard.

In the second and third specifications it is averred in substance that the proceedings were void for the reason that the viewers had asked for and obtained two extensions of time in which to make and file their report. The commissioners had authority to grant the extensions, and if the viewers found it impossible to complete their work within the time first fixed, they did exactly what the law required them to do. *Bondurant v. Arney*, 152 Ind. 244.

The fifth specification is based on the theory that the collection of the assessment should be restrained because the surveyor of Kosciusko county alone accepted the work and issued the certificate. The statute relating to drains in two counties (§§5677-5680 Burns 1894, §§4308-4311 R. S. 1881 and Horner 1897) makes no provision for the acceptance of work by the surveyors of the two counties acting jointly or by either alone; but requires that the proceedings be begun in the county containing the head of the proposed ditch and be governed so far as applicable by the provisions in reference to drains in one county. In *Denton v. Thompson*, 136 Ind. 446, it was held that appeals by remonstrators must be taken, irrespective of their residence, to the circuit court of the county whose commissioners had original jurisdiction of the proceedings. The statute relating to drains in two counties contains no reference to appeals. Similarly, the part of this statute directing that such drain be repaired by the joint action of the proper officers of the two counties having been declared inoperative, other parts of the drainage acts were looked to, and it was held that the repairs should be made throughout the entire ditch by the surveyor of the county in which the proceedings originated. *Watkins v. State*, 151 Ind. 123. Analogously, it might well be decided that the surveyor of Kosciusko county, that being the county containing the head of the ditch, was the proper

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officer to accept the work in both counties. But it is unnecessary to pass upon the question, for this specification fails to show any equities that should entitle appellant to an injunction. It discloses, if anything, a mere irregularity of an officer in carrying out the judgment. It fails to show that appellant has not received all the benefits he would have received if the work had been accepted in what he claims was the proper manner. This ground for injunctive relief is therefore insufficient. *Montgomery v. Wasem*, 116 Ind. 343; *Fletcher v. White*, 151 Ind. 401.

The sixth specification is as follows: "That plaintiff had no notice of the time set for the hearing of the petition and report of viewers either at the time of the action of the board of commissioners thereon, December 5, 1893, or at the time of the action of said board on the petition and amended and corrected report had on the 9th day of March, 1894, nor did the plaintiff have any notice of the pendency of said proceedings, or of the action of the board of commissioners of Kosciusko county, or of the action of the board of commissioners of Marshall county in said ditch proceedings." From the allegations preceding the specifications it appears that some notice had been given. Personal notice was not required. It is not alleged that the constructive notice provided for by the statute was not given. In the absence of a sufficient averment to the contrary, the presumption is that the statutory notice was given and in the manner and for the time prescribed by the statute, and that the court acquired such jurisdiction of the person of the appellant as enabled it lawfully to make the orders and render the judgment in the ditch proceedings. The allegation "that the plaintiff had no notice" was not sufficient. The complaint must disclose what, if anything, in relation to notice is shown by the record of the proceedings that are collaterally assailed. *Bank v. Aull*, 102 Ind. 322; *Baltimore, etc., R. Co. v. North*, 103 Ind. 486; *Pickering v. State*, 106 Ind. 228; *Bailey v. Rinker*, 146 Ind. 129; *Long*

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v. Ruch, 148 Ind. 74; *Thompson v. Harlow*, 150 Ind. 450. In the eighth specification it is contended that the proceedings are void for the reason that the drain was not completed according to the plans and specifications. If the drain was not completed according to the terms of the contract, and the appellant was thereby damaged, he had a legal remedy; and the mere fact that the ditch was not so completed can not be accepted as a sufficient ground for enjoining the collection of the assessment. *Muncey v. Joest*, 74 Ind. 409; *Studabaker v. Studabaker*, 152 Ind. 89. In the latter case it was held, in reference to an analogous drainage statute, that, although there was no express provision requiring the board to determine when the ditch has been completed according to contract, the act contemplates that the proceedings shall remain on the docket until the final completion of the work and that the board shall pass upon the surveyor's report of completion and that any landowner affected may appear and controvert such report.

The fourth specification, upon which issues were joined, charges that the proceedings are void for the reason that the commissioners of Marshall county did not participate therein "conjointly" with the commissioners of Kosciusko county as required by §5678 Burns 1894, §4309 R. S. 1881 and Horner 1897. Appellant urges that the decision is contrary to the law and the evidence. The evidence shows that each board, sitting in its own county, had the petition, report, etc., presented to it, and each made the same orders and rendered the same judgment as the other. The insistence of appellant is that the judgment is void because the two boards did not sit together and form themselves into one tribunal. It is very doubtful if that is the correct construction of the statute. Shall the six men act as one body in which three from Marshall county and one from Kosciusko shall establish a ditch in Kosciusko over the opposition of the other two from Kosciusko? Where are the records, the clerk, the seal of the new tribunal? Where shall it sit? Or, shall the

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boards act conjointly, each in its own place, with its own records, clerk and seal, as the house and senate of a legislative body do in adopting a joint resolution? The boards, in this instance, construed the statute in harmony with the curative act of 1897. Acts 1897 p. 231. But appellant can not require in this collateral attack either a construction of the section in question or a consideration of the legality or effect of the curative act. The boards were compelled to construe a somewhat doubtful and obscure statute in reference to the mode of exercising a jurisdiction that was clearly conferred upon them. If they adopted the wrong construction, it would be an erroneous exercise of power, not a usurpation. Van Fleet's Coll. Attack, §66. Judgment affirmed.

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[No. 19,127. Filed February 21, 1900.]

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CRIMINAL LAW.—Evidence.—Assault with Intent to Kill.—A verdict convicting defendant of assault and battery with intent to commit voluntary manslaughter will not be disturbed on appeal on the evidence, where there was evidence that defendant, while driving along the road in a sleigh, met the prosecuting witness, who was driving a team of horses attached to a sled loaded with logs, called out to the driver to give him the road, and, upon reply of the driver that he could not, jumped out of the sleigh, and said, with an oath, "you can give the road, I will kill you," and drew his revolver and fired at the driver. pp. 244, 245.

SAME.—Instructions.—Instructing the jury in a prosecution for assault with intent to kill that the felonious intent alleged in the indictment might be inferred from the evidence, if facts were proved which satisfied the jury beyond reasonable doubt of its existence, without a statement or description of the acts or declarations which would authorize such inference, was not reversible error, where the jury were clearly informed in another instruction of the character of the evidence from which such intent might be presumed. p. 245.

SAME.—Evidence.—Deadly Weapon.—Proof that the weapon used was a Smith & Wesson revolver of thirty-two caliber was a sufficient basis for an instruction as to the use of a deadly weapon in a prosecution for assault with intent to kill, without specific evidence that the weapon used was a deadly one. p. 245.

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CRIMINAL LAW.—Instructions.—Relationship of Witnesses to Accused.

—An instruction in the trial of a criminal action that in determining the weight to be given to the testimony of the different witnesses they might take into account, among other things, the relationship they sustained, if any, to the accused, was not erroneous. pp. 245, 246.

SAME.—Instructions.—Reasonable Doubt.—Influence of Fellow Jurymen.

—An instruction that a doubt as to the guilt of the accused in the minds of one or more of the jurors ought not to control the action of the other jurors, if any, so as to compel them to agree to a verdict of acquittal, if convinced beyond a reasonable doubt of the guilt of defendant, was not erroneous, where the jury were also instructed that if any one of them, after duly considering all of the evidence in the case, and consulting with his fellow jurymen, entertained a reasonable doubt as to the guilt of the defendant, or as to the existence of any fact or element necessary to constitute his guilt, the jury could not convict the defendant. pp. 247, 248.

APPEAL AND ERROR.—Evidence.—Immaterial Question.

—Available error cannot be predicated upon the ruling of the court upon a question and answer wholly immaterial to the issues. p. 248.

CRIMINAL LAW.—Intimidation of Witnesses.—Evidence.

—Evidence of attempts on the part of accused to bribe or intimidate witnesses may be properly considered in determining the guilt or innocence of the accused, and is admissible for such purpose. p. 248.

MISCONDUCT OF COUNSEL.—Argument.—Criminal Law.

—Overruling an objection to a statement by the prosecuting attorney in his argument to the jury in a prosecution for assault with intent to kill, that when defendant drew his revolver the prosecuting witness ran, "and it was well for him that he did run, when you consider the character of the defendant as shown by the evidence," is not reversible error, since the word "character" was, perhaps, inaccurately used instead of "disposition," and the allusion was not to the impeaching testimony, but to the evidence of his actions and behavior at the time of the assault. pp. 248, 249.

From the Jay Circuit Court. *Affirmed.*

Richard H. Hartford, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley* and *D. E. Grimes*, for State.

DOWLING, J.—The appellant was indicted for a felonious assault upon one Erwin Hall, with the intent to kill and murder the said Hall by shooting him with a revolver. Trial by jury. Verdict of guilty of assault with intent to commit voluntary manslaughter. The verdict also found that the

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no rule of law in saying to the jury that they were the exclusive judges of the facts, and of the credibility of the witnesses, and that, in determining the weight to be given to the testimony of the different witnesses, they might take into account, among other things, the relationship they sustained, if any, to the accused. This instruction in nowise invaded the province of the jury. Nor is it objectionable as singling out a particular witness, or class of witnesses, as objects of suspicion or distrust. *Stevens v. Leonard*, ante, 67, and cases cited.

In *Nelson v. Vorce*, 55 Ind. 455, cited by counsel, the objectionable portion of the charge was this: "The evidence of parties to the action, and those related to them, as their sons and daughters, is not entitled to as much weight as the evidence of disinterested witnesses." This statement was justly condemned, and the court say: "Such relationship, either to the action, or to a party to the action, may or may not detract from the weight which his evidence is entitled to; but whether it does or does not, in any case, is a question for the jury and not for the court." In the present case, the court did not indicate to the jury that the fact of such relationship did or ought to detract from the weight of the evidence of such related witness, or from his credibility, but, it properly left those questions entirely to the determination of the jury. The instruction in *Bradley v. State*, 31 Ind. 492, was disapproved because it cast discredit upon a medical witness for the reason that he came from another state, with the expectation that his expenses would be paid by the party calling him. Where near relatives of a party are called by him as witnesses, such relationship is always a proper matter for the consideration of the jury in estimating the value of their testimony, and the court may so instruct the jury; but it would not be proper for the court to say that the testimony of witnesses so related was entitled to less weight on account of such relationship. The weight of the testimony given is to be determined exclu-

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sively by the jury. *People v. Bush*, 71 Cal. 602, 12 Pac. 781; *State v. Nash*, 8 Ired. (N. C.) 35; *Brown v. Walker*, 32 Ill. App. 199; *Allen v. Kirk*, 81 Iowa 658, 47 N. W. 906; *Michigan, etc., Co. v. Wilcox*, 78 Mich. 431, 44 N. W. 281; *State v. Bacon*, 13 Ore. 143, 9 Pac. 393, 57 Am. Rep. 8; *State v. Nash*, 10 Iowa 81; *State v. Parker*, 39 Mo. App. 116. At least three near relatives of the appellant were called by him as witnesses, and were examined on his behalf. The fact of such relationship was a legitimate subject for comment in the argument, and we think it was entirely proper for the court to say to the jury, for their information and guidance, that, in determining the weight to be given to the testimony of witnesses, they might take into account their interest, or want of interest in the case, their manner on the stand while testifying, the probability or improbability of their testimony, and the relationship they sustained, if any, to the accused. Such general observations were nothing more than statements of well established rules, recognized by all courts, for estimating the value and weight of evidence, and the credibility of witnesses, and the jury were entitled to the information that they might apply these rules.

It is next insisted that the twenty-fourth instruction was erroneous, because it stated that a doubt as to the guilt of the accused in the minds of one or more of the jurors ought not to control the action of the other jurors, if any, so as to compel them to agree to a verdict of acquittal, if convinced beyond a reasonable doubt of the guilt of the defendant. The jury had been told in the preceding part of the same instruction that if any one of the jurors, after duly considering all the evidence in the case, and consulting with his fellow jurymen, entertained a reasonable doubt as to the guilt of the defendant, or as to the existence of any fact or element necessary to constitute his guilt, the jury could not convict the defendant. Having said this much, it was not improper for the court to add that such doubt in the minds of one or more of the jurors should not compel those who,

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upon the other hand, were convinced beyond a reasonable doubt to yield their convictions, and join in a verdict of acquittal. The effect of the instruction was merely to impress the members of the jury with a sense of individual responsibility and personal independence in the discharge of their important duties. *Richardson v. Coleman*, 131 Ind. 210; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369.

The question asked the witness Eley as to the width of the vehicle in which the appellant was riding, as compared with other vehicles of the same kind, was wholly immaterial, and the answer to the question was equally so. No error can be predicated upon the ruling of the court upon this question and answer.

The court, over the objection and exception of the appellant, permitted the State to prove a conversation which took place, sometime after the alleged assault, between the appellant and one of the principal witnesses for the State, in which, after an ineffectual effort to induce the witness to enter his employment, the appellant said: "If you give us any trouble, and send me over the road, or so I will go there, I have brothers that will watch you all your life." This evidence was competent, and the court did not err in admitting it. Attempts to bribe, or intimidate witnesses may be properly considered in determining the guilt or innocence of a person charged with crime; but they are not conclusive. *Martin v. State*, 28 Ala. 71; *Moriarty v. London, etc., R. Co.*, L. R. 5 Q. B. 314; *Jones v. State*, 64 Ind. 478, 479; *Adams v. People*, 9 Hun 89; *Chicago City R. Co. v. McMahon*, 103 Ill. 485; *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14; *Regina v. Justices of Cornwall*, 20 W. R. 669; *Dean v. Commonwealth*, 4 Gratt. 541. Such conduct is regarded as in the nature of an admission that the party has a bad case, which cannot be supported by honest proof.

In the course of the argument, the prosecuting attorney used this language: "When the defendant came around the back part of his buggy, and drew his revolver from his

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pocket, Hall slid off the sled, and started to run; and it was well for him that he did run, when you consider the character of the defendant as shown by the evidence." This statement was objected to by counsel for appellant, who asked that it be withdrawn from the jury, and the jury instructed to disregard it. The court overruled the objection and motion, with the remark, "I don't think the argument improper." Appellant, thereupon, excepted, and moved that the jury be discharged. His motion was overruled, and he now complains of the action of the court as error.

Evidence had been introduced impeaching the character of the appellant as a witness, and counsel seem to think the allusion of the prosecutor was to this testimony, and that such misconduct ought to reverse the judgment. If the reference was to the impeaching evidence, such reference was improper and illogical, but we cannot say that it would be ground for reversal. *Morrison v. State*, 76 Ind. 335. We think, however, that the allusion was not to the impeaching testimony, but to the evidence of the actions and behavior of the appellant at the time of the collision on the highway. A natural inference from his conduct at that time was that he was unreasonable, overbearing, violent, and reckless of human life. The word "character" was, perhaps, inaccurately used where "disposition" was evidently meant. The rulings of the court upon the questions presented were correct. *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211.

The last objection discussed by counsel for appellant relates to the constitutionality of the act approved March 8, 1897, known as the "Indeterminate Sentence Law", and the form of the judgment in this case. That act has repeatedly been held constitutional, and the form of the judgment is authorized by its provisions. *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109; *Wilson v. State*, 150 Ind. 697; *Vancleave v. State*, 150 Ind. 273; *Hunter v. State*, 150 Ind. 696; *Skelton v. State*, 149 Ind. 641; *Davis v. State*, 152 Ind. 145. Finding no available error in the record, the judgment is affirmed.

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DUFFY v. THE STATE.

[No. 19,163. Filed February 23, 1900.]

CRIMINAL LAW.—Robbery.—Indictment.—Larceny.—The offense of larceny is included and involved in the charge of robbery, and one may be properly convicted of larceny under an indictment charging robbery. p. 252.

SAME.—Robbery.—Indictment.—Larceny.—Where defendant was charged with robbery and convicted of the lesser offense of larceny, he is not in a position to complain on the ground that the evidence showed that the crime committed was that of robbery. pp. 252, 253.

From the Marion Criminal Court. *Affirmed.*

Frank Hendricks, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

JORDAN, J.—Appellant was charged with the crime of robbery, and, on a trial before a jury was convicted of petit larceny. A motion for a new trial, which assigned as errors the giving of certain instructions, and also that the verdict was contrary to law and the evidence, was overruled. The court adjudged that appellant be imprisoned in the State's prison for an indeterminate period of not less than one and not more than three years, and that he be fined in the sum of \$1, and disfranchised and rendered incapable of holding any office of trust or profit for a period of one year.

The sole error assigned is the overruling of the motion for a new trial. His counsel complain of the third, ninth, and tenth instructions in the series given by the court on its own motion.

The indictment charged that appellant, at the time and place therein named, "did feloniously, violently, and forcibly make an assault upon Francis Leak, and did then and there and thereby feloniously and forcibly, with violence and by putting in fear, steal, take, and carry away from the person of the said Francis Leak \$6 in money, of the value of \$6 of the property of the said Francis Leak," etc.

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By the third instruction, the court, after reading to the jury the statute defining the offense of petit larceny, informed them that, under the indictment, the defendant might be convicted of that crime if they were satisfied, beyond a reasonable doubt, that the property was taken by the defendant from the prosecuting witness, but was not taken by force or by putting him in fear. The ninth charge in part is as follows: "If you and each of you are satisfied beyond a reasonable doubt that this defendant, at the time and place and in the manner and form charged in the indictment, did feloniously steal, take, and carry away the personal goods of said Francis Leak of the value of less than \$25, then it is your duty to find him guilty of petit larceny, and find his age." By the remainder of the same charge, the court advised the jury in regard to their right, in the event they found the defendant guilty of petit larceny, to assess his punishment, if they deemed it sufficient, at imprisonment in the Marion county jail or workhouse for any determinate period not exceeding one year, and that he be fined in any sum not exceeding \$500, and disfranchised and rendered incapable of holding any office of trust or profit for a determinate period. By the tenth charge, the court informed the jury that if they had a reasonable doubt of the defendant's guilt of the charge of robbery, as charged in the indictment, it was their duty to resolve that doubt in his favor, and he should be acquitted; or that, if each of them had a reasonable doubt that the defendant did feloniously steal, take, and carry way the personal goods of the said Leak, as charged in the indictment, then that doubt should be resolved in his favor, and he should be acquitted.

Counsel for appellant contends that, under the evidence, if the accused is guilty of any crime it is that of robbery, as it is asserted that the evidence conclusively shows that the prosecuting witness was robbed of his money; but it is insisted that appellant had no part in the transaction.

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The principal objection urged in respect to the instructions, especially to the third, and ninth, is that they are not applicable to the evidence, inasmuch as the latter establishes, as contended, that the crime perpetrated was robbery, and not larceny. It is further contended that the issue involved for the jury to determine was not as to whether the crime committed was robbery or larceny, but the question was as to whether defendant "had anything at all" to do with committing the offense of robbery.

The objection urged against the instructions is wholly without merit. The third instruction, when construed along with the ninth and others embraced in the court's charge to the jury, is substantially correct. It is true the principal charge against appellant, under the indictment, of which he was convicted, is that of robbery. The offense, however, of larceny is included and involved in that charge. If the jury entertained a reasonable doubt as to the defendant's guilt of the greater offense, namely, that of robbery, as charged in the indictment, then it was their province and duty to acquit him of that crime; but they were not required, as counsel apparently insist, to acquit him entirely; for, if they believed from the evidence, beyond a reasonable doubt, that he was guilty of the offense of petit larceny, as charged in the indictment, it was their province and right to find him guilty, as they did, of that offense. *Hickey v. State*, 23 Ind. 21; *Rains v. State*, 137 Ind. 83; *Vancleave v. State*, 150 Ind. 273; §1904 Burns 1894, §1835 R. S. 1881 and *Horner* 1897.

Robbery is said to be larceny in an aggravated form, for the reason that the goods or money are forcibly and feloniously taken from the person of the owner by violence or by putting him in fear. *Bonsall v. State*, 35 Ind. 460; *Arnold v. State*, 52 Ind. 281, 21 Am. Rep. 175.

Although the indictment in the case at bar was for robbery, nevertheless, it necessarily involved the question of the larceny of which the accused was convicted. It is true, as

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counsel insist, that if the jury considered the witnesses who testified upon the part of the State worthy of belief, their evidence established that the crime committed was robbery, and that appellant, along with others, was guilty of committing that crime. But the jury, in their wisdom, seem to have believed that the accused was guilty of the lesser offense, and convicted him accordingly. Of this decision of the jury, appellant, under the circumstances, is not in an attitude to complain.

There is no error, and the judgment is affirmed.

GARARD ET AL. v. YEAGER, ADMINISTRATOR.

[No. 18,740. Filed February 28, 1900.]

CONTRACTS.—Annuities.—A stipulation in a contract to pay the owner of a life interest in real estate a certain annuity therefor to bequeath "all of such annuity which shall not be used for her support and maintenance during her lifetime" clearly indicates the intention of the parties, and is not void for uncertainty of description of what was to be bequeathed. *p. 258.*

SAME.—Bequests.—Consideration.—Annuities.—An agreement to pay an annuity for the use of real estate during the life of the owner was a sufficient consideration for a contract to bequeath the unused portion of the annuity. *pp. 258, 259.*

SAME.—Waiver of Conditions.—One does not waive any right given by contract, unless, with a full knowledge of all of the material facts, he does or forbears the doing of something inconsistent with the right, or his intention to rely upon it. *p. 259.*

From the Madison Circuit Court. *Reversed.*

J. A. Roberts, M. Vestal, D. W. Wood and W. S. Ellis,
for appellants.

*Kirkpatrick, Morrison & McReynolds, Stevenson, Shirts
& Fertig, Kittinger, Reardon & Diven and Fertig and Alex-
ander,* for appellee.

MONKS, J.—This action was brought by appellee against appellants to reform a mortgage on real estate executed by appellants, by correcting a mistake in the amount secured thereby, to foreclose the same, and to recover a judgment for the indebtedness secured by said mortgage.

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Appellants filed an answer in five paragraphs, and a cross-complaint in two paragraphs. Appellee filed an answer to said cross-complaint in two paragraphs. Appellants' demurrer to the second paragraph of said answer was overruled. After issues were joined the case was tried by the court, and a finding made, and judgment rendered in favor of appellee.

The errors assigned call in question the action of the court in overruling appellants' demurrer to the second paragraph of appellee's answer to the cross-complaint. In the second paragraph of said cross-complaint, it is averred that "in 1874 Frances Coffman (formerly Frances Spurlin) was the owner of a life estate in certain real estate in Shelby county, Indiana; that about said year the appellant, Tunis Garard, entered into a written agreement, by the terms of which he agreed to pay said Frances Spurlin an annuity of \$25, and also furnish her a home as one of the family of said Tunis, and board her during her lifetime, or, if said Frances should desire to make her home elsewhere than in the family of said Tunis, then the said Tunis should pay her an annuity for her maintenance and support, in the sum of \$125, for such time as she did not make her home in the family of said Tunis. In consideration of which it was further provided in said agreement that said Tunis should have the use and benefit of such life estate in said land, and that said Frances Spurlin should give and devise to said Tunis Garard all of said annuity not used by said Frances for her support and maintenance during her lifetime; that in pursuance to said agreement said Tunis took possession of said real estate, and received the income thereof, and said Frances made her home with him as one of his family from the year 1874 until the year 1879, and that said Tunis fully paid said annuity during that time; that in the year 1879 said Frances married one Henry Coffman, and from that time ceased to make her home with said Tunis. A copy of said written agreement cannot be filed herewith, nor be more fully set out, for the reason that the same has been accidentally

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destroyed, and cannot be found. Afterwards the said Tunis and wife, then owning the fee in said land upon which said Frances formerly held said life estate, conveyed the same to one Patterson, and the said Frances and her said husband at the time also executed their conveyance, conveying all their interest in said land to said Patterson; that shortly afterwards said Tunis purchased land in Hamilton county, Indiana, and, to secure the payment to said Frances of such annuity, executed a mortgage to her, his said wife joining therein, securing the payment to said Frances of such annuity; being the same mortgage set out in the second paragraph of complaint, dated March 30, 1881; that said Tunis continued to pay such annuity of \$125, or so much thereof as requested by the said Frances; that from the year 1880 until the year 1894 the accumulated surplus of such annuity not used by said Frances, amounted to the sum of \$1,068; that during the said year 1894 said Tunis executed to said Frances, as evidence of the amount of such unpaid annuities, his promissory note in said sum, which said note is the one sued on, and set out in the complaint; that on the 2nd day of June, 1894,—the said Frances having before that time entered a release of the mortgage executed to her in 1881,—said appellant executed another mortgage to said Frances securing the payment of said annuity as the same became due; said mortgage being the one set out in the first paragraph of the complaint; that said Frances Coffman died intestate in the month of October, 1896, leaving sufficient other property than the indebtedness sued on to pay all the indebtedness against her estate; that all the indebtedness sued on in this action is the unused part of such annuity so agreed to be paid by said Tunis under said written agreement, and said Frances died without giving or devising the same to appellants; that appellee, as administrator of said estate, has been, since his appointment, claiming and holding said indebtedness as a part of the estate of said Frances. Said decedent and her administrator have refused to comply

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with the terms of said written contract, and appellants have fully complied with their part thereof; that, by reason of the non-performance of said written contract on the part of said Frances, appellants have been damaged in the sum of \$2,000." Prayer for relief.

It is alleged in the second paragraph of answer to said cross-complaint "that, prior to the year 1880, said Frances sold her life estate in said eighty acres of real estate to said Tunis Garard, in consideration of which he agreed to pay her the sum of \$125 annually, on the 1st day of March of each year, so long as the said Frances should live; that said Frances Coffman and her husband received no consideration whatever from said Patterson for the conveyance to him of said real estate in Shelby county, but that the entire consideration therefor passed to said Tunis Garard; that appellants ought not to recover on either paragraph of said cross-complaint, and the alleged contract therein referred to, for the reason that on March 30, 1881, appellants executed to Frances E. Coffman a mortgage on the real estate therein described, to secure said Frances the payment of such annuity or annual payment to be paid on account of the sale of such life estate, in which mortgage appellants entered into an absolute agreement to pay such sum of \$125 annually to said Frances, on the 1st day of March of each year, so long as she might live, which mortgage [after setting forth the description of the real estate in Hamilton county, Indiana,] is in the words and figures following: 'To secure the payment when the same shall become due of a pension or allowance hereby declared due said Frances Coffman of the sum of \$125 annually, said amount to be paid the said Frances Coffman on the 1st day of March of each year so long as she lives and at her death said payments to stop, and the mortgage to be void. And the mortgagors expressly agree to pay the sum of money above secured without relief from valuation or appraisement laws.' That on April 14, 1894, said Tunis Garard, being desirous of pro-

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curing a loan of \$6,000 on said real estate and other land, entered into an agreement with said Frances Coffman by the terms of which he agreed that in consideration that she would release said mortgage so that he could execute a mortgage on said real estate to secure said loan of \$6,000, which would be superior to her mortgage, he would execute to her a new mortgage to secure the same debt and obligation which was then secured by the mortgage held by her, there being then due thereon the sum of \$1,068; that, pursuant to said agreement, said Frances did execute a written release of said mortgage, and afterwards, on June 2, 1894, appellants executed to said Frances a mortgage [a copy of which mortgage is set out] in the words and figures following: 'To secure the payment of \$125 per annum to be paid the said Frances Coffman on the 1st day of March, 1895, and the same sum annually on the 1st day of March of each year thereafter, during the life of Frances Coffman, and at her death this mortgage to be null and void, and the mortgagors expressly agree to pay the sum of money above secured without relief from valuation or appraisement laws.' That in the execution of said mortgage appellants and said Frances, the mortgagee, intended that the same should secure the entire amount that was due under the terms of the mortgage so released, as well as the sum of \$125 annually to be paid on the 1st day of March each year so long as said Frances should live, but through the mutual mistake of all parties to said mortgage, as well as the scrivener who wrote the same, no reference was made to the amount then due under the terms of the mortgage so released; that, on the 22nd day of June 1894, said Tunis Garard executed a promissory note to said Frances for the \$1,068, as evidence of the amount then due under the terms of said mortgage so released as aforesaid, payable twelve months after date, with eight per cent. interest from date and attorney's fees waiving valuation and appraisement laws; that there was no reference or mention in either of said mortgages, or said

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note, to the contract alleged in the cross-complaint; that appellants have never accounted to or paid said Frances Coffman, or any one in her behalf, the amount of such annuity, or any part thereof, except by the execution to her of said note and mortgage as herein set out. Wherefore appellee says that appellants, by the execution of said mortgages and note, waived the said alleged written agreement referred to in said cross-complaint, and are estopped from recovering on the same, or enforcing the same in this action."

It is insisted by appellee that the agreement to devise contained in the cross-complaint was void for uncertainty as to the amount. It is true that the amount of said annuity, if any, that would not be used by said Frances for her maintenance and support, was not known when said agreement was made, and the amount was uncertain, but the expression in said contract, "all of such annuity which shall not be used for her support and maintenance during her lifetime" is certain, and the word "all" clearly indicates the intention of the parties. If Frances Coffman had, in compliance with her contract, bequeathed the unused part of said annuity in said language, it would have been a sufficient description thereof. *Brady v. Smith*, 8 Misc. 465, 28 N. Y. Supp. 776; *Roehl v. Haumesser*, 114 Ind. 311, 314, 315; 1 Beach on Cont. §81, p. 107; 29 Am. & Eng. Ency. of Law, 359. The language used by the parties in making said contract, concerning what was to be bequeathed to appellants, furnished the means of identification, which is all the law requires. Said contract is not void, therefore, on account of the description of what was to be bequeathed. *Roehl v. Haumesser*, *supra*.

Appellee next insists that the agreement to bequeath was not supported by any consideration whatever. It was alleged in the cross-complaint that the annuity which appellants were to pay was the consideration for said life estate, and the agreement on the part of Frances Coffman to be-

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queath all the annuity not used for her support and maintenance. It is not material whether or not the life estate was worth as much or more than the annuity. The parties were capable of contracting, and, having determined the adequacy of the consideration, the contract to make the bequest cannot be avoided in the absence of fraud or mistake. The consideration was valuable and sufficient. 6 Am. & Eng. Ency. of Law (2nd ed.), 677, 678, 694, 703, 704; *Caviness v. Rushton*, 101 Ind. 500, 51 Am. Rep. 759. Neither can we concur in appellee's contention that appellants waived the contract of Frances Coffman to make said bequest by the execution of the mortgage in 1881, and the note and mortgage in 1894. A person does not waive any right given by contract, unless, with a full knowledge of all the material facts, he does, or forbears the doing of, something inconsistent with the right, or his intention to rely upon it. 28 Am. & Eng. Ency. of Law, 526, 527; Bishop on Cont. (Ed. 1887), §792; *Bucklen v. Johnson*, 19 Ind. App. 406, 419, 420. There was nothing in the mortgage executed by appellants in 1881, or the promise to pay the sums of money secured, contained therein, or in the mortgage executed in 1894, and the promise to pay the sums of money secured, contained therein, or in the promissory note for \$1,068 for past due annuities executed by Tunis Garard in said year, inconsistent with the agreement of said Frances to make said bequest, or that released her from its performance. They all can stand without conflict. Said Frances could as well make a bequest of all the annuity not used for her support and maintenance, if the same was evidenced by said note and the promises contained in said mortgages, as she could if it was evidenced only by the promise in the written agreement of 1874, or the same had been paid, and was cash unexpended in her hands. Her contract to make said bequest did depend upon whether the unused part of said annuity had been paid to her, and was held in cash, or was loaned to some one, or was evidenced

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by the note and mortgage of appellants. The unused part of said annuity under said agreement was to be bequeathed to appellants, whether the same at her death was cash in her hands, or in bank, or had been loaned to some third party, or was unpaid, and evidenced by notes and mortgages, or only by the promise of appellants contained in the agreement of 1874. The agreement of appellant to pay said annuity was not upon condition that said Frances first execute a will making said bequest, but his agreement was to pay the same annually, without any condition whatever, either in cash, or by furnishing said Frances a home in his family, and the remainder in cash. The contract of said Frances only required her to make such bequest so as to be effective after her death. This she could do by the execution of a proper will at any time before her death. It is evident, therefore, that *Evansville, etc., R. Co. v. Dunn*, 17 Ind. 603, and cases of that class cited by appellee, are not in point here. Moreover, each of said mortgages expressly provides that it shall be void at the death of said Frances, the mortgagee. Said paragraph of answer was not in effect an argumentative general denial, nor was it sufficient as an answer in confession and avoidance. It is evident that the court erred in overruling appellants' demurrer to said second paragraph of answer to the cross-complaint. The presumption is that said error was prejudicial to appellants, and there is nothing in the record showing that the same was harmless. Judgment reversed, with instructions to sustain the demurrer to said second paragraph of answer to the cross-complaint, and for further proceedings not inconsistent with this opinion.

THE GOVERNMENT BUILDING AND LOAN INSTITUTION
NO. 2 v. DENNY ET AL.

[No. 18,707. Filed Dec. 15, 1899. Rehearing denied Feb. 23, 1900.]

HUSBAND AND WIFE.—*Tenants by Entireties*.—*Mortgages*.—A mortgage executed by a husband and wife upon real estate formerly held by them as tenants by entireties, but which was conveyed to a third person, and by such third person conveyed to the husband, both conveyances being without consideration, and for the purpose of enabling the husband to procure a loan for his sole use and benefit, is voidable, at her instance, under §6964 Burns 1894, not only as to her, but also as to the husband. p. 266.

SAME.—*Tenants by Entireties*.—*Mortgages*.—*Estoppel*.—Where a wife holding real estate with her husband as tenants by entireties joined in a conveyance thereof to a third person, who reconveyed it to the husband in order to enable the husband to procure a loan thereon, joined her husband in the execution of a mortgage and aided by her acts in inducing the mortgagee to make the loan upon the representation made by the husband, in her presence, that he was the owner of the realty, she will be estopped from denying the validity of the mortgage. pp. 267-270.

From the Jay Circuit Court. *Affirmed in part and reversed in part*.

W. H. Latta, J. J. M. LaFollette and O. H. Adair, for appellant.

J. F. LaFollette and C. P. Cole, for appellees.

JORDAN, J.—Appellant originally instituted this action to recover a personal judgment against John L. Denny on a certain promissory obligation, and to obtain a foreclosure of a mortgage executed to it by the said John L. Denny and wife, Hattie G. Denny, on June 17, 1895, upon certain real estate in Jay county, Indiana, owned and held at the time the action was commenced by David H. Parker, who, together with his wife, were made party defendants. Thereafter, the appellee, Hattie G. Denny, made application to the court to be made a party defendant, and her application was granted. Appellant then filed its amended complaint,

154	261
162	680
154	261
163	90
154	261
170	202

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joining her together with appellees, McKee and McKee, judgment creditors, as additional defendants to the action. Mrs. Denny filed her separate answer to the amended complaint in three paragraphs, the third being a cross-complaint under which she sought affirmative relief. By the first paragraph of her answer, she admitted the execution of the mortgage in suit, but averred that at and prior to its execution she was, and still is, a married woman, the wife of her codefendant, John L. Denny; and that the said mortgaged premises at that time were owned and held by her and her said husband as tenants by entireties; that on February 19, 1895, her husband, John L. Denny, was desirous of procuring a loan of money from the plaintiff, and securing the same by a mortgage on said real estate; that he, on said 19th day of February, procured her to join him, without any consideration whatever, in conveying said real estate to Mary C. Rownd; and that on the following day, February 20, 1895, said Rownd, without any consideration therefor, executed a deed conveying said real estate to said John L. Denny; that said conveyances were all made for the sole purpose of enabling her husband to obtain the loan in question from plaintiff, and to secure payment thereof by the mortgage upon said property,—all of which was fully known and understood by the plaintiff at the time of its execution; that the money borrowed of plaintiff by her husband, and secured by the mortgage, as aforesaid, was for his sole use and benefit, and that she received no part thereof and no part of the money was used for her benefit,—all of which was known by the plaintiff at the time the loan was made to her husband. It is further averred that, after the execution of the mortgage in suit, the defendant and her husband traded, or exchanged, the mortgaged premises to her codefendant, David H. Parker, for other real estate described, situated in Dunkirk, Jay county, Indiana; and that Parker and wife conveyed said real estate, so exchanged for the mortgaged premises, to the defendant, Mrs. Denny, and her husband,

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as tenants by entireties; and, in order to indemnify and save said Parker harmless as against plaintiff's mortgage, she and her husband executed to said Parker a mortgage upon the real estate conveyed by him and his wife to the defendant and her said husband, which latter mortgage, it is alleged, is still in full force and effect, and that the said Parker is now seeking to foreclose it; wherefore, the answer alleges that the mortgage in suit is void and judgment for cost is demanded.

The second paragraph of her answer is substantially the same as the first except that the facts are more fully averred, and it is alleged that Mary C. Rownd, for the colorable consideration of \$3,000, but without any actual consideration, conveyed the real estate to the husband, John L. Denny.

The cross-complaint alleges in the main the same facts as are set up in the answer, and also avers that, on June 17, 1895, John L. Denny, the husband, executed to plaintiff his certain undertaking or bond whereby he agreed to pay to plaintiff the sum of \$1,000, together with interest at eight per cent. per annum, and certain charges, etc., and that defendant, said Hattie G., and her said husband executed to plaintiff the mortgage in suit upon the real estate described. The cross-complaint also alleges that the mortgage was recorded in the recorder's office of Jay county, Indiana, and a copy of the instrument is filed as an exhibit; and the relief demanded, under the facts set out in the cross-complaint, is that the mortgage in question be canceled and held for naught. John L. Denny, together with his wife, also answered the amended complaint by a general denial.

The plaintiff, having unsuccessfully demurred to each paragraph of Mrs. Denny's separate answer, including the cross-complaint, filed a reply in four paragraphs, and also an answer in two paragraphs to the cross-complaint, the first of which was a general denial. By the first paragraph of its reply, the plaintiff admitted the coverture of Mrs. Denny at the time of the execution of the mortgage, and substantially

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alleged that, at the time the loan in question was made and the mortgage executed to secure the same, it had no notice or knowledge whatever of any claim or interest made or had by her in or to the mortgaged premises, except such interest as she had therein by virtue of her being the wife of said John L. Denny. It is further averred in this paragraph of the reply that she made both oral and written statements that said real estate belonged to her husband, and that she had no interest therein other than that held by her as his wife; that the plaintiff relied upon these statements so made by her, and believed them to be true, and was thereby induced, in good faith, to make said loan and furnish said money to John L. Denny, believing that said real estate belonged to him, which belief, it is averred, was induced by the acts, statements, and written affidavits of said Hattie G. Denny; wherefore it is said that she ought not to have and maintain her said defense. The second paragraph set out facts to show that the money obtained from plaintiff by the husband under the loan was by him, at the request of his wife, invested for her benefit in a stock of goods, which she still owned and held as her own separate property. The third paragraph of the reply was the general denial, and the fourth set out facts under which the plaintiff asked to be subrogated to the rights of Parker in the mortgage held by him upon the premises which he had conveyed to the defendant and her husband. By the second paragraph of the answer to the cross-complaint of Mrs. Denny, the plaintiff admitted that the real estate mortgaged by said John L. and Hattie G. Denny to plaintiff was formerly owned by them, as alleged; that they conveyed said real estate to one Mary C. Rownd, and thereafter the latter, in February, 1895, conveyed it to John L. Denny; that plaintiff accepted its mortgage thereon in June, 1895, and the record at that time showed that the title to said real estate was in John L. Denny, and the latter made a written statement, duly sworn to by him, that he was the legal owner of the property, and

that the conveyances made by himself and his wife to Mary C. Rownd, and by the latter to him, were each a *bona fide* conveyance for a valuable consideration; and that the plaintiff had no knowledge whatever of any claim of Hattie G. Denny to said real estate; that it made said loan of \$1,000 to, and paid over the money to, said John L. Denny in good faith, relying upon the abstract of title furnished it and the affidavit of John L. Denny, and believing the statements therein to be true; that said Hattie G. Denny knew that her said husband was about to procure a loan on said property, and knew that he was making said affidavit, and knew that plaintiff was relying upon the statements so made by her and her husband, and that she stood by and heard said statements made and aided in procuring said mortgage and joined in its execution, and by her acts induced and caused the plaintiff to pay out said money to her husband, and caused plaintiff to rely on said statements made by her husband and to accept said mortgage and make said loan to him. Wherefore it is alleged that she ought not to recover on her cross-complaint.

A demurrer upon the part of the defendant, Hattie G. Denny, was sustained by the court to the first paragraph of the plaintiff's reply to her separate answer, and her demurrer was also sustained to the second paragraph of plaintiff's answer to her cross-complaint. Upon the issues joined, under the pleadings as they stood after the action of the court in sustaining the demurrers, as above stated, there was a trial by the court, and a finding by it that there was due to the plaintiff from the defendant, John L. Denny, on the bond executed by him, the sum of \$1,243.71. The court found for the defendant, Hattie G. Denny, on her cross-complaint, that the mortgage in suit was void and ought to be canceled. The court also found in favor of the defendants, Parker and Parker, and McKee and McKee, and, over plaintiff's motion for a new trial, a judgment was rendered upon the finding in favor of the plaintiff against John L. Denny for the

amount due from him on the bond in suit; and it was further adjudged and decreed that the mortgage in suit was void and of no effect, and the same was decreed to be canceled, and that the said Hattie G. Denny recover from plaintiff her cost laid out and expended. A judgment for cost was also rendered in favor of the defendants, Parker and Parker, and McKee and McKee.

Counsel for appellants urge, under the assignment of errors, that the court erred, *inter alia*,—(1) In holding the several paragraphs of the separate answer of the appellee, Mrs. Denny, together with her cross-complaint, sufficient on demurrer; (2) that it erred in sustaining her demurrer to the first paragraph of the reply, and to the second paragraph of the answer to her cross-complaint.

It is settled by repeated decisions of this court that a mortgage by a married woman on her separate real estate, to secure the debt of her husband or any other person, falls within the provisions of §6964 Burns 1894, §5119 R. S. 1881 and Horner 1897, which forbids her from entering into a contract as surety for another, and that she may defeat the enforcement of such mortgage, unless her conduct or acts are shown to be such as will operate to estop her from calling in question its validity. It is also well settled that when she joins with her husband in the execution of a mortgage upon real estate, owned and held by her and him as tenants by entireties, to secure his debt, or that of some other person, such mortgage, at her instance, under the statute, is voidable, not only as to her, but also as to the husband. It is an ancient legal maxim that when anything is prohibited directly, it can not be done indirectly, or, in other words, a prohibition which the law imposes can not be evaded by any circuitous contrivance. Barton's Leg. Max., p. 77; Broom's Leg. Max., p. 488. Hence, in obedience to this rule, a married woman can not evade the positive prohibition of the statute in question by vesting the title to her real estate in her husband, or some other person, for the sole

purpose, as alleged in the answer of appellee, of permitting it to be mortgaged to secure a debt other than her own, where the party accepting such security knows that the contrivance was resorted to for the purpose of evading the law. *Long v. Crosson*, 119 Ind. 3, 4 L. R. A. 783, and cases there cited; *Trimble v. State*, 145 Ind. 154; *Grzesk v. Hibberd*, 149 Ind. 354, and cases there cited; *Wilson v. Logue*, 131 Ind. 191. It is evident, under the authorities cited, that the facts alleged in the answer of the appellee to the amended complaint, and also in her cross-complaint, are sufficient to withstand a demurrer, and there was no error in the court's ruling thereon.

We may next consider the second proposition presented in respect to the alleged error of the court in sustaining the demurrer of the appellee, Hattie G. Denny, to the first paragraph of the reply, and to the second paragraph of the answer to the cross-complaint. The facts alleged in the first paragraph of the reply are, perhaps, not as certain or specific as the rules of good pleading exact. This paragraph of the reply and the answer of appellant to the cross-complaint both proceed upon the theory that the appellee, Mrs. Denny, under the facts therein, is estopped to deny that her husband was not the owner of the mortgaged premises for all purposes at the time the plaintiff made its loan and accepted the mortgage as security therefor. The facts, as averred in the answer to the cross-complaint, substantially disclose that the real estate in controversy, prior to February, 1895, was owned by the appellee and her husband as tenants by entireties; that subsequently they conveyed this real estate to Mary C. Rownd, and the latter, in February, 1895, conveyed it to the husband, John L. Denny. After the title, under the conveyance from Rownd, had been vested in the husband, and had so remained until some time in June following, a period of about four months, appellant made the loan to the husband, and accepted the mortgage in dispute as security for such loan. The public records, upon their

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face, at that time, disclosed that Denny, the husband, was invested with the absolute ownership of the land, and, in addition, an abstract of title was furnished to appellant, and the husband, by his statements, verified by his affidavit, represented that he was the legal owner of the premises in question, and that the conveyance made to Mary C. Rownd by himself and wife, and the conveyance by the latter to him, were made in good faith and for a valuable consideration. It also appears that appellant relied upon the abstract of title and the representations made by the husband, and believed them to be true, and, at the time the mortgage was accepted, it had no knowledge whatever that Mrs. Denny had any interest or claim of title in or to the premises in controversy. It is further disclosed from the pleading that she knew that her husband was about to procure a loan from appellant on the security of the property in question, and that she knew that appellant was relying upon said representations that he was the owner of the realty; that she stood by and heard the representations of her husband, and affirmed the same, and aided by her acts in inducing the plaintiff to make the loan to him, and to accept the mortgage on the real estate in dispute as security for such loan. The pleading certainly shows, under its averments, that the wife, Mrs. Denny, with full knowledge of the representations that her husband had made, to the effect that he, and not she, was the owner of the land, and that the conveyances which purported to fully invest the husband with the title to the property were good-faith transfers for a valuable consideration, stood by, and, in effect at least, affirmed the same to be true, and that appellant, without any knowledge to the contrary, relied upon the statements of the husband, as confirmed by the wife, upon the question of the ownership of the property. The legal effect of these facts must be such as to estop her to deny that her husband, at the time the loan was made and the mortgage executed as security therefor, was not the real owner, for all purposes,

of the mortgaged premises, and, therefore, she can have no standing in court, under these facts, to deny the validity of the mortgage in suit.

In *Trimble v. State*, 145 Ind. 154, on p. 162 of the opinion, in reviewing the question of suretyship of a married woman, under the statute in question, this court said: "The disability as to suretyship, imposed by the statute upon a married woman, must be considered in connection with another provision of the same act, to the effect that she shall be bound by an estoppel *in pais*, and no construction ought to be given to this exception by the statute of her ability to contract as will place in her hands a sword to defend her own fraud and imposition on others, instead of a shield for her protection as the law intended."

In the case of *Long v. Crosson*, 119 Ind. 3, it was held that where the wife transfers her real estate to her husband, by a conveyance importing a money consideration, for the purpose of enabling him to mortgage it as his own property, to secure a loan of money for his own benefit, she will be estopped from asserting that such transfer was not in good faith, as against the mortgagee, who is shown to have had no knowledge that such conveyance to the husband was a mere contrivance to evade the statute.

In *Duckwall v. Kiener*, 136 Ind. 99, the question arose as to the estoppel of a married woman, in a foreclosure proceeding, to deny the ownership of her husband to the mortgaged premises. In that case, Hackney, J., speaking as the organ of this court, said: "There is no doubt, upon principle and the decisions of this court, that a married woman may be estopped by acts *in pais* in cases involving her equitable title to real estate. [Citing numerous authorities.] The rule applied in the cases cited is but the general rule that one may not stand by and permit another to invest on the strength of an adverse claim of title or may not permit another to remain clothed with the *indicia* of ownership by which third persons are misled in their investments.

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Though such conduct is not in itself fraudulent, the law holds it a fraud, after such conduct, to deny the results which have flowed from such conduct. *Hirsch v. Norton*, 115 Ind. 341; *Wisheart v. Hedrick*, 118 Ind. 341; *Maxon v. Lane*, 124 Ind. 592, and the numerous cases cited in each. The principle underlying the rule is that where one of two, even innocent persons, must suffer by the act of a third, he must suffer whose conduct has made it possible to do the act."

Appellant, in the case at bar, in making the loan, was not dealing with the wife but with the husband, and it would seem, upon the facts alleged, that it was justified in believing that the title to the property had been in good faith transferred to him. Under the authorities cited, it must be held that the first paragraph of the reply and the answer to the cross-complaint stated facts sufficient to create an estoppel against the appellee, Hattie G. Denny, and we therefore conclude that the court erred in sustaining a demurrer thereto. Other questions arising upon the evidence are discussed, but, as these may not arise again upon another trial, we dismiss them without consideration.

The personal judgment against John L. Denny on the bond in suit is affirmed. For the errors pointed out, the judgment and decree in favor of the appellees, under the issues raised upon appellant's complaint, in respect to the foreclosure of the mortgage, and as to its cancelation, under the cross-complaint of Hattie G. Denny, is in all things reversed, and the cause is remanded to the lower court for further proceedings not inconsistent with this opinion.

CUNNINGHAM v. TULEY.

[No. 19,210. Filed Jan. 25, 1900. Rehearing denied Feb. 23, 1900.]

JUDGMENTS.—*Verity*.—*Courts*.—*Probate of Will*.—Where a will was admitted to probate upon the testimony of a subscribing witness before the clerk in vacation, and the judgment confirming the probate thereof was fair on its face, the clerk of such county cannot

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be required under §2752 Burns 1894 to produce the will for probate in another county, although the testatrix, immediately before her death, was an inhabitant of the latter county, since it was the duty of the court of the latter county to accept the record of the court of the former county as true.

From the Floyd Circuit Court. *Reversed.*

E. B. Stotsenburg, for appellant.

G. H. Hester, for appellee.

BAKER, J.—Appellee filed in the Floyd Circuit Court his verified application, under §2752 Burns 1894, §2582 R. S. 1881 and Horner 1897, stating that one Sarah Johnson died testate in October, 1898; that, immediately previous to her death, she was an inhabitant of Floyd county; that in her will she nominated appellee as executor; that the will is in the custody of appellant, who neglects and refuses to produce it for probate; and asking that appellant be oited to produce the will that it may be duly proved. In his verified return to the citation, appellant alleges that the will is not and never has been in his possession as an individual; that he is and for more than two years has been the clerk of the Harrison Circuit Court of Indiana; that on November 3, 1898, in vacation, the will was produced in his office before him as clerk by one of the subscribing witnesses; that the subscribing witness represented to him that the testatrix, immediately previous to her death, was an inhabitant of Harrison county; that the subscribing witness testified before him that the will was duly executed and that the testatrix at the time of executing it was competent to devise her property and not under coercion; that this testimony was written down by him, subscribed by the witness, and attested by the seal of the court and by his signature as clerk; that the will, with the testimony and attestation, were recorded by him in a book kept for that purpose and certified by him to be a complete record; that he attached to the will a certificate of probate conformable to the statute; that on November 14, 1898,

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the first day of the November term of the Harrison Circuit Court, he reported his proceedings to the court; that the court thereupon confirmed the probate of the will; that the judgment, after reciting the proceedings before the clerk, continues: "And the court, having seen and examined said will and testimony of said witness and all acts of said clerk in the premises, and no objections being made to said will and the probate thereof, and all acts of said clerk being proper and in due form of law, the same are now in all things ratified, approved and confirmed by the court"; that this judgment is in full force; that the will is in the courthouse at Corydon as part of the files and records of the Harrison Circuit Court, and as such, and not otherwise, is in the custody of appellant. On appellee's motion, this return was stricken out and an order entered committing appellant to jail until he produce the will.

Appellant, by not denying, confessed appellee's allegation that the testatrix, immediately prior to her death, was an inhabitant of Floyd county. That is, the Harrison Circuit Court decided a matter to be true, namely, that the testatrix, immediately prior to her death, was an inhabitant of Harrison county, which was false. But the record of the proceedings in the Harrison Circuit Court is fair on its face; and it was the duty of the Floyd Circuit Court to accept that record as true. On the facts stated in appellant's return, appellee has mistaken his remedy. *Bruce v. Osgood, post*, 375, and authorities there cited.

Judgment reversed, with instructions to overrule the motion to strike out the return, and to proceed in consonance with this decision.

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GIBSON v. MEGREW ET AL.

[No. 18,911. Filed March 6, 1900.]

INSURANCE.—Collection of Assessments.—Beneficial Associations.—Assessments against members of a beneficial association for the benefit of a beneficiary of a deceased member cannot be enforced by suit, where the only penalty provided in the contract for non-payment was the forfeiture of the defaulting member's certificate and all benefits thereunder.

From the Marion Circuit Court. *Affirmed.*

O. H. Carson and J. C. Moore, for appellant.

S. N. Chambers, S. O. Pickens and C. W. Moores, for appellees.

JORDAN, J.—Appellant, Eliza Gibson, petitioned the Marion Circuit Court, in behalf of herself and others, to order appellees, as the assignees or trustees of the Masonic Mutual Benefit Society of the State of Indiana, to levy and collect assessments from all persons who had been members thereof within the past six years. The demand of the petitioner was that such an assessment, under the order of the court wherein such trust was pending, be made by the appellees as would create a sum sufficient to pay all death losses remaining unpaid, together with accrued interest thereon, and all costs of collecting such assessments, etc. A demurrer was sustained to the petition, and judgment was rendered against appellant for cost. The only error assigned is predicated upon this ruling and judgment.

The petition discloses substantially the following facts: Appellant is the beneficiary under a certificate or policy of insurance, numbered 12,009 in class four, issued by the said Masonic Mutual Benefit Society on the life of her husband, James H. Gibson, bearing date of July 15, 1887, whereby the said society agreed, in consideration of the representations made in the application for membership, and the sum of \$6 in hand paid, and the further sum of \$1.80, to be paid

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to the secretary of the society by James H. Gibson, upon due notice to him of the death of a member, to pay to appellant, upon the death of her said husband, after satisfactory evidence of his death had been furnished, the sum of seventy cents for every member of the first class, seventy-five cents for every member of the second class, ninety-five cents for every member of the third class, and the sum of \$1.60 for every member of the fourth class, belonging to the society at the time of the death of said James H. Gibson; provided that the aggregate amount of benefits payable under such policy or certificate should not exceed the sum of \$2,500. It is alleged that said James H. Gibson, while a member of said company, performed all and singular the agreements and promises made by him in his application for insurance, and has complied with all of the terms and conditions contained in his said certificate, and has complied with all the provisions of the society's constitution and by-laws. It further appears that said Gibson, while a member of the society, and in good standing therein, died on June 24, 1897, previous to the assignment of the society, as hereinafter mentioned. Upon his death it is averred that appellant became entitled, upon the conditions contained in said certificate of insurance, to receive the benefits therein named to the full amount of \$2,500; which claim was, on the — day of September, 1897, approved by the said society's board of directors, and a partial payment to the amount of \$100 was made to appellant, leaving the remainder of her said claim still due and unpaid. On January —, 1898, the society, being insolvent, made an assignment, under the assignment laws of this State, to appellees for the benefit of all of its creditors. It further appears that the Masonic Mutual Benefit Society of Indiana was organized at the city of Indianapolis, Marion county, Indiana; on August 5, 1869, and the articles of association, under which it was organized, were recorded in the recorder's office of Marion county, Indiana. The object of the association, as

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declared in these articles, was to give financial aid and benefit to the widows, orphans, and dependents of deceased members. The names and residences of the incorporating members, together with a description of the seal, are all given or stated in said articles. In addition to the articles of association, the constitution and by-laws, etc., adopted by the society are also set out and made a part of the petition.

This appeal may be said to present two questions: (1) Is there, under the terms and provisions entering into the contract or policy of insurance issued by the society to a member, an absolute undertaking upon his part to pay the stipulated assessments or premiums as will render him personally liable to the company for such payment, and which the latter can enforce by an action? (2) In the event that such a liability exists, did the right to make an assessment and enforce it, as demanded by appellant, pass to appellees in and by virtue of the assignment made by said society?

The obligation imposed upon a holder of a certificate of insurance in this society must be determined by an interpretation of its own terms and provisions, regard being had, however, to the law under which the society was created, and to the terms and provisions of its constitution and by-laws, which may have any bearing thereon.

The petition refers the incorporation of the society in question to an act of the legislature of this State approved September 20, 1865, which act authorizes the organization of mutual life insurance companies. This statute appears to be supplemental to one approved June 17, 1852, which provided for the organization of mutual fire insurance companies. The supplemental act authorized the creation of mutual life and accident companies under the same conditions and subject to the same duties and liabilities, so far as applicable, as were provided by the fire insurance statute to which it was supplemental. See §§4876 to 4895, inclusive, Burns 1894, §§3745 to 3763 R. S. 1881 and Horner 1897.

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Appellant's counsel insist that this society was incorporated under the authority of §4895, *supra*. The terms and provisions of its articles of association, and the method employed for its incorporation, and the provisions of its constitution and by-laws clearly demonstrate, we think, that counsel in their insistence are mistaken. That its organization was not, neither was it intended to be, founded upon these statutes, we think is evident. The very terms and provisions of its articles of association, and the recording thereof, respond to the requirements of the statute concerning voluntary associations, and there can be no doubt, we think, but what it was intended to be organized in compliance with the provisions of that statute. Davis' Revision, 1876, p. 923, §4583 Burns 1894. Section 4583 of this statute authorizes the adoption of rules and regulations by associations organized thereunder, for the government of their officers and members; but, aside from this, there is nothing in the statute to enlighten us in the decision of the question involved in this appeal.

Each applicant for membership was required to subscribe to a written application, wherein, among other things, he agreed to abide by the constitution and by-laws of the association, and any amendments thereafter made, and further agreed therein to accept and abide by whatever rules, regulations, and modifications which might be adopted or made by the board of directors, regulating or governing assessments or the payment of mortuary claims, in accordance with the provisions of the constitution and by-laws of the society. It was further agreed and stipulated in the application that any certificate issued thereon should be upon the following express conditions and agreements: "First. That this contract shall be void if the party to whom it is issued shall die in consequence of a duel. * * * Second. If the insured shall die by his own hand or act. * * * Third. No agent of the society is authorized to make, alter or discharge contracts or waive forfeitures.

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Fourth. By his acceptance of the certificate to be issued hereon, said member expressly consents that any and all physicians shall testify fully as witnesses touching any matter confided to them. * * * Whenever a certificate, held by a member who has paid all assessments in full, shall become a claim by death, after having been in force three full years, the society shall not contest its payment on account of the incorrectness of any statement in the application. * * * Fifth. Should the board of directors reject any claim, no suit thereunder shall be sustained in any court unless the same be commenced within one year after such rejection. * * * Sixth. The said member, by his acceptance of said certificate agrees, that, in case of his death, any unpaid balance due from him to the reserve fund, or from the assessments, or otherwise, as provided by the constitution of the society, shall be deducted from any payment made thereunder; but nothing herein contained shall be held to constitute a waiver of the forfeiture for non-payment of assessments, as provided in said constitution or by-laws."

The certificate or policy of insurance issued by the society to an applicant, upon the acceptance of his application, in part is as follows: "This certificate of membership witnesseth, that the Masonic Mutual Benefit Society of Indiana, in consideration of the representations made to it in the application for membership, which, by reference, is made a part hereof, and the sum of \$6 to it in hand paid, and the further sum of ——— dollars, to be paid to the secretary of the society by the said———, upon due notice to him of the death of a member of the society, as provided in the by-laws of the society, such payment to be made on or before the last day of the month in which such notice is issued, or sent to him, the society does promise and agree with the said ——— (insured), his heirs, executors, administrators, and assigns, well and truly to pay to ——— (beneficiary) or, in case of the previous death of the person or persons to whom this certificate is made payable, within ninety days

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after satisfactory evidence of the death of the said ——— (insured) has been presented to and approved by the board of directors of said society, the sum of seventy cents for every member of the first class, the sum of seventy-five cents for every member of the second class, the sum of ninety-five cents for every member of the third class, and the sum of \$1.60 for every member of the fourth class, belonging to the society at the time of the death of the said ——— (insured); provided, the aggregate amount of benefits payable under this certificate shall not exceed the sum of \$2,500. This certificate is issued and contract made upon the following express conditions and agreements: First. If the said ——— (insured) shall be expelled from any masonic lodge or other masonic body, such expulsion shall work expulsion from this society, or in case he shall, without the consent of the president and secretary of the society, previously obtained in writing, engage in any military or naval service whatever, in time of war or rebellion, or in case he shall die by his own hand, or by the hands of justice, or in violation of the laws of any country where he may reside, or by or from the effects of intemperate habits, or from 'delirium tremens' induced by intemperate habits, then, or in either case, this certificate shall be null and void. Second. No agent of this society shall have power to waive or alter any conditions or terms expressed in this certificate of membership, or to give any receipt for money that shall bind the society, except as herein provided. Third. By his acceptance of this certificate, the said ——— (insured) expressly consents that any and all physicians shall testify fully as witnesses touching any matters confided to them by him at any time material to the rights of the parties under this certificate, and that upon the discovery of any untruth or deception in his application for membership by him made, the society may cancel and annul this certificate. In witness whereof," etc.

Section one of article six of the constitution adopted by

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the society divided the members thereof into seven classes according to age. Sections two and three of the same article provide as follows: "Section two. When an assessment has been made by the board of directors, it shall be the duty of the secretary to send, or cause to be sent, by mail, to the last known post-office address of each member, a notice containing the amount and date of payment of such assessment; and the notice so sent shall be deemed and taken to be a lawful and sufficient demand for the payment of such assessment. The secretary may authorize the local agent in the city or town where the member resides to act for him in serving such notice, either personally or by mail, which notice so sent or served by such local agent shall be deemed and taken to be a lawful and sufficient notice for the payment of the assessment so called for and required. Section three. A member failing to pay his assessment by the last day of the month in which such notice is sent shall forfeit his certificate of membership, and all benefits thereunder; but a member, after so forfeiting his membership for non-payment of assessments, may be reinstated by the board of directors within thirty days after such forfeiture, by paying all arrearages, and furnishing a certificate of good health from a medical examiner of the association, subject to the approval of the medical director." Section one of article eight provides: "Upon the death of a member of the society, each member shall be assessed, and shall pay to the secretary of the society a sum according to the class of which he is a member, and the amount of the certificate held by him as follows." Here follows a schedule of assessments to be made upon different amounts of insurance and ages of the insured, the amounts ranging from \$500 to \$2,500, and the ages from twenty-one years to seventy-five years. This section contains the following proviso: "Provided that the board of directors shall determine the number of assessments to be collected during any one month; and provided, further, that upon the death of a member his certificate shall be charged with and

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there shall be deducted therefrom an amount equal to one assessment for each death occurring in the society prior to the death of such member on which payment has been made by such member." Section thirteen of the by-laws reads as follows: "When an assessment has been made by the board of directors it shall be the duty of the secretary to send or cause to be sent, by mail, to the post-office address of each member, a notice containing the amount and date of payment of such assessment. The notice so sent shall be deemed and taken to be a lawful and sufficient demand for the payment of each assessment. The secretary may authorize the local agent in a city or town where the member resides, or any special agent of the society, to act for him in serving notices of assessments, either personally or by mail, which notice so sent or served shall be deemed and taken to be a lawful and sufficient notice for the payment of the assessment so called for and required. Any member failing to pay his assessment by the last day of the month in which such notice is issued shall forfeit his certificate of membership, and all benefits thereunder, but a member after so forfeiting his membership for non-payment of assessments may be reinstated by the board of directors within thirty days after such forfeiture, by paying all arrearages, and furnishing a certificate of good health from a medical examiner of the association, subject to the approval of the medical director."

The certificate of insurance issued by the society to a member recites that it is in consideration of the representations made in the application for membership, and the sum of \$6 cash in hand paid, and the further sum of—— dollars to be paid to the secretary of the society by the assured upon due notice to him of the death of a member, as provided in the by-laws of the society, such payment to be made on or before the last day of the month in which the notice is issued or sent. The certificate does not, by its own terms, declare what will be the result of the non-payment

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by the insured in the event he fails to pay all subsequent assessments to be made upon the death of a member. It was stipulated, however, in the application, which, by reference, is made a part of the certificate of insurance, that the latter should be issued upon certain enumerated conditions, among which it was provided that, in case of the applicant's death, any unpaid balance due from him to the reserve fund, or from assessments or otherwise, as provided by the constitution of the society, should be deducted from any payment made thereunder. It was declared, however, that nothing therein contained should be held to constitute a waiver of the forfeiture for non-payment of assessments, as provided in the constitution or by-laws.

The law is well settled that when a person enters into an association he must acquaint himself with its constitution and by-laws, as these are considered important factors in testing his rights, duties, and liabilities. *Supreme Lodge v. Knight*, 117 Ind. 489, 3 L. R. A. 409; *Supreme Council v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501; 3 Am. & Eng. Ency. of Law (2nd ed.) p. 108.

In the application for membership in the case in question, the applicant expressly agrees to abide by the constitution and by-laws of the society as they then exist, or as they may be changed by subsequent amendments. Consequently there can be no question but what the constitution and by-laws enter into and form elements of the contract of insurance issued by the society to a member; and therefore the contract of insurance is to be considered along with the society's constitution and by-laws so far as the latter are pertinent to the question involved. The object in construing a written contract is to ascertain, as far as possible, the intent of the contracting parties. So, in this case, the principal question involved must be solved by an interpretation, under the settled rules of the law, of the intent of the contract as it existed between the society and the insured member in respect to the liability of the latter for the payment of mortuary assessments.

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Section two of article six of the constitution, as we have seen, provides for notifying a member of a death assessment when made. Section three provides in terms, in effect, that the failure to pay the assessment within the time therein stated shall result in the forfeiture of the defaulting member's certificate, and of all benefits thereunder, except the right of reinstatement is reserved, subject to the conditions provided. Section thirteen of the by-laws combines the provisions embraced in the above mentioned sections of the constitution. These provisions of the constitution and by-laws, as previously stated, must be considered as elements which enter into and form a part of the contract of insurance. They are virtually all of the provisions of the constitution and by-laws which can be said to have any bearing upon what the society and its insured member, under the contract, contemplated in regard to the enforcement of the payment of subsequent assessments which were to be levied upon the death of a member. We discover nothing, either in the application, certificate issued thereon, or the constitution or by-laws, which can be construed or interpreted as an absolute promise, upon the part of the assured, to pay these assessments, or which can be said to create the relation of creditor and debtor between a member and the society in respect to such assessments.

The parties to the contract of insurance were apparently content to provide only in regard to future assessments that, after notice thereof, the failure to pay any such assessment within the stipulated time should *ipso facto* terminate the contract of insurance, and result as a forfeiture of all rights, money paid, and benefits thereunder, except the reserved right to reinstatement. That this should be the inevitable result of a non-payment of an assessment was no doubt deemed to be the most efficient means of coercing or inducing the payment upon the part of the members of the assessments levied. That this result must follow the non-payment

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of assessments, under the plain provisions of the constitution and by-laws, is certainly not a debatable proposition. The question of forfeiture, under the circumstances, was not a matter merely within the option of the society, but necessarily followed from the force and effect of the constitution and by-laws. These were as binding and controlling upon the officers of the association as they were upon its members.

We have seen that the act concerning voluntary associations, under which the society in question was organized, is silent in regard to the payment of assessments or withdrawal of members of such association, and hence this statute can cast no light upon the interpretation of the contract, as it apparently has left the whole matter to be controlled by the constitution and by-laws of the association.

It can not in reason be asserted that there is anything in the provisions of the society's constitution or by-laws, or the application or certificate in question, which can be construed into an agreement upon the part of the assured that, after the forfeiture of all of his rights and benefits has taken place, he would continue as a member of the society for the payment alone of assessments, and that the latter might be enforced against him by suit after all of his rights and benefits, under the contract, had been terminated and destroyed. The assessments provided for were made to pay the losses occasioned by the death of a member, and, when collected through the agency of the society, the money did not belong to it, but went into a fund to pay the beneficiaries of the deceased member or members.

While it is true that the society in controversy was a mutual benefit society, the object of which was to give financial aid and benefit to the widows, orphans, and dependents of a deceased member, still that fact does not render it any the less a life insurance association, operating under the assessment plan it adopted. Courts have, as a general rule, treated such societies as life insurance companies, applying to them, and the policies which they issue, the principles

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pertinent to the contracts of life insurance. 2 May on Ina. (3rd ed.) §550a.

The contract of an ordinary life insurance company, under its contract of insurance wherein the assured is required to pay, at the time stated, the premium as provided, and wherein it is also provided that a forfeiture of the contract shall result in the event of the non-payment of such premium, is considered, in a legal sense, to be a unilateral contract. The premium or assessment to be paid, in order to continue the risk, under such circumstances, is held not to constitute an indebtedness against the insured in favor of the company. The payment of such premium or assessment is considered as a condition precedent, upon the performance of which the company, under its contract, continues to carry the risk as originally assumed. As a general rule, under such contracts, in the absence of anything to the contrary, the insured has the right to elect whether he will continue to pay his premiums or assessments, as they become due, or forfeit the contract. He must make his election after notice of the assessment within the time fixed for the payment, or suffer the loss of membership, and thereby terminate his rights and the liability of the company or society under the contract of insurance, save and except, as heretofore stated, the right of reinstatement, when the same is expressly reserved, as in the case at bar, or except any other right which may have been expressly reserved from the effect of the forfeiture. 2 May on Ins., (3rd ed.) §341a; *Rood v. Railway, etc., Assn.*, 31 Fed. 62; *Worthington v. Charter Oak Ins. Co.*, 41 Conn. 372; *Goodwin v. Massachusetts, etc., Ins. Co.*, 73 N. Y. 480.

As a general proposition, this same doctrine applies to mutual benefit societies. The main feature of the plan adopted by such insurance societies is that death losses are to be paid by voluntary contributions upon the part of its surviving members. Accordingly, the society, on the death of a member in good standing, levies an assessment upon

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the surviving members in good standing. Such assessment, which is in the nature of the premium exacted in ordinary life companies, when paid by the member within the time provided, serves to continue his policy in full force and effect until it may be forfeited by the non-payment of some subsequent assessment. That the levy of such assessments, as a general rule, does not serve to make the insured member a debtor to the society, so as to authorize the latter to enforce the payment thereof by suit, is well settled by the authorities. *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648; *Clark v. Schromeyer*, 23 Ind. App. 565; *In re Protection Life Ins. Co.*, 9 Biss. 188; 2 Bacon on Ben. Soc., etc., §357; Niblack on Mutual Ben. Soc., §276; *State v. Merchants, etc., Soc.*, 72 Mo. 146; *Commonwealth v. Wetherbee*, 105 Mass. 149; *Rood v. Railway, etc., Assn.*, 31 Fed. 62.

The rule applicable to the question is well and aptly stated by Bacon in his work on benefit societies, *supra*. In §357, the author says: "In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums, or assessments, and consequently no personal liability therefor. The payment of the premium, or assessments, is only a condition precedent of the liability of the company; the insured does not promise to pay the premiums and the company only promises to pay if it has received the agreed consideration. Therefore the insured may pay or not as he pleases, he has the perfect right to do either and need give no excuse for his choice. If he does not pay, the contract is ended. It follows, therefore, that the premium, or assessment, is only a debt when there is an absolute promise to pay embodied in the contract. Whether or not such absolute promise to pay is embodied in the contract is a question of construction."

We have examined *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435, *New Era Life Assn. v. Rositer*, 132 Pa. St. 314, 19 Atl. 140, *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889, *Rundle v. Kennan*, 79 Wis. 492,

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48 N. W. 516, *Fulton v. Stevens*, 99 Wis. 307, 74 N. W. 803, *McDonald v. Ross-Lewin*, 29 Hun 87, and other cases which it is claimed support appellant's contention, but these, with the exception of *Ellerbe v. Barney, supra*, are, under the facts, distinguishable from the case at bar, and do not sustain appellant's view. The distinguishing feature, in the main, in the above cases, is that the contracts therein involved contain a promise upon the part of the assured to pay the assessments. No such element can be said to enter into the contract under consideration.

It is true that the holding in *Ellerbe v. Barney, supra*, fairly supports the insistence of appellant. The action in that case was instituted by the receiver of the Masonic Mutual Benefit Society, of Missouri, which association had been operated as a life insurance company under the assessment plan. The controversy was as to whether the insurance policies issued by it to its members contained a promise on the part of the latter to pay the assessments. The majority of the court held that the policy or contract of insurance issued by the society must be so construed, and that the assessments were collectible by suit. Chief Justice Black and Justices Brace and Burgess dissented. The dissenting opinion prepared by the Chief Justice is, in our judgment, more convincing in its reasoning, and is better fortified by authorities than is the majority opinion.

It may perhaps be said that an irreconcilable conflict exists between the holding in *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648, and *Ellerbe v. Barney, supra*. The court in the latter case, however, seems, in our opinion, to have made the mistake of considering that the death assessments levied by the society were in the nature or character of society dues, and therefore a member could not escape the payment thereof by terminating his membership. That the assessments, under the provisions of the contract in this case, can not be so viewed or considered is a proposition too plain to be controverted.

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In *Lehman v. Clark*, *supra*, the receiver of the Masonic Benevolent Association of Central Illinois sued to recover of its members assessments in order to pay death losses which had accrued while the association was a going concern. The society in that case, and also the facts and questions involved, may be said to be substantially identical with the particular association and questions involved in this appeal. It was held in a well considered opinion in that case that an insurance contract in a benevolent association, wherein a provision is made for a forfeiture of all payments and benefits by reason of the non-payment of assessments within the time stated therein, is unilateral in its obligation, and that the right or remedy of the association, upon the default of a member in paying his assessments, is to declare a forfeiture, and that its right to sue and recover the assessment could not be maintained by it nor by its receiver. This decision was followed by our own Appellate Court in the appeal of *Clark v. Schromeyer*, 23 Ind. App. 565.

To reiterate what we have previously stated, it is evident, we think, that when the policy or contract of insurance involved in this case is considered along with the society's articles of association, its constitution and by-laws, and the application for membership, there is nothing which can in reason be interpreted as an agreement or obligation, upon the part of its insured members, to pay the mortuary assessments, such as would thereby constitute them debtors of the society, and hence authorize it to enforce the payment of the assessments by suit. If the contracts involved herein could be said to be doubtful in respect to the interpretation of the question presented thereunder, and thereby be open to the application of the doctrine of practical construction, it is possible that the acts of the society's governing officers, in the administration of its affairs for a period of almost thirty years, might disclose that it, through its officers, had placed a construction upon the question in issue in this case wholly incompatible with the construction or interpretation for

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which appellant now contends. As the society, under the contracts in dispute, was not authorized to sue and thereby recover of its members unpaid assessments, certainly it can not be claimed that the appellees, who are but its assignees, are invested with any greater rights than it was in respect to enforcing by suit the payment of the assessments in controversy. It follows, therefore, and we so conclude, that appellant, under her petition, is not entitled to any relief, and the demurrer thereto was properly sustained.

The judgment is affirmed.

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[No. 19,252. Filed March 6, 1900.] •

154	288
187	212
154	288
166	70

JUDGES.—*Appointment of Special Judge.*—*Habeas Corpus Proceeding.*

—The regular judge of a circuit or superior court has authority under the statute to appoint a special judge to hear and determine a *habeas corpus* proceeding. p. 290.

COURTS.—*Jurisdiction.*—*Special Judge.*—Where one goes to trial, without objection, before a judge who assumes to act under color of authority, he cannot, after judgment or conviction, successfully make the objection that the judge acted without authority. p. 290.

HABEAS CORPUS.—*Collateral Attack.*—*Special Judge.*—A writ of *habeas corpus* is a collateral remedy, and in an assault upon a judgment rendered by a court of competent jurisdiction, it will be presumed on appeal, in the absence of any showing to the contrary, in support of a motion to quash the writ, that the court had full jurisdiction of the subject-matter, and that all the proceedings were according to law, and such presumption applies with equal force to the appointment of a special judge. p. 290.

From the Lake Superior Court. *Affirmed.*

A. F. Knotts, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores, C. C. Hadley* and J. O. Bowers, for appellee.

HADLEY, C. J.—Upon petition filed in the Lake Superior Court, a writ of *habeas corpus* was duly issued to the appellee, as sheriff of Lake county, commanding him to produce the body of appellant before the court and show cause why

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he restrained Crawford of his liberty. In obedience to the writ, appellee produced the body of appellant and successfully moved the court to quash the writ. Appellant refused to amend his petition, and, electing to stand by the exception, judgment was rendered denying the writ. The sufficiency of the petition to sustain the writ is the only question presented by this appeal.

The petition in substance alleges that Crawford is imprisoned by the appellee, as sheriff, in the county jail, on a pretense, founded on a void commitment issued to him by the clerk of the Lake Circuit Court, a copy of which commitment is set forth. It recites that in the cause of the State of Indiana v. Henry B. Crawford, on the 22nd day of December, 1899, the same being the 29th judicial day of the November term, 1899, of the Lake Circuit Court, before the Honorable Johannes Kopelke, special judge of said court, the following proceedings were had by said court in said cause, to wit: "State of Indiana v. Henry B. Crawford. No. 2,435. Embezzlement. Now again comes the State of Indiana by its prosecuting attorney, and comes also the defendant in his own person and by counsel, and the defendant's motion for a new trial herein is now by the court overruled, to which ruling of the court the defendant excepts, and, thereupon, the court grants said defendant thirty days in which to file his bill of exceptions, and the defendant being thereupon asked by the court if he had any reason to assign why sentence should not be pronounced, and the defendant assigning no reason * * ." Then follows, in due form, a judgment of imprisonment in the State prison at Michigan City, signed, "J. Kopelke, Special Judge"; all of which is duly attested by the clerk and seal of the court.

It is then alleged that said pretended commitment was issued by the clerk upon a pretended illegal and void judgment rendered by one Kopelke on the 22nd day of December, 1899, who was at the time pretending to act as special judge of said Lake Circuit Court under an appointment

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in said cause, which the petitioner alleges to be illegal and void; that said restraint is illegal, in this, that the pretended judgment rendered by Kopelke is illegal and void, for the reason that he had no jurisdiction of the subject-matter or the person of said Crawford, and no jurisdiction to render said judgment.

The petition discloses that appellant was personally present before the circuit court for trial on a charge of embezzlement. The circuit court is a court of general jurisdiction, and hence had jurisdiction of such subject-matter. The regular judge also had ample authority, under the statute, to appoint a special judge to hear and determine appellant's case. §§1446, 1447 Burns 1894.

No effort is made to disclose why Kopelke, who acted as special judge, did not have jurisdiction, nor does it appear from the petition or bill of exceptions that appellant objected to going to trial before Kopelke; and the cases are abundant which declare that "where a party goes to trial, without objection, before a judge who assumes to act under color of authority, he can not after judgment or conviction successfully make the objection that the judge acted without competent authority in the trial of the case." *Schlunger v. State*, 113 Ind. 295, 296.

A writ of *habeas corpus* is a collateral remedy, and in an assault upon the judgment of a court of competent jurisdiction we must, in the absence of any showing to the contrary, conclusively presume, in support of a motion to quash the writ, that the court had full jurisdiction of the subject-matter, and that all the proceedings were according to law; and this presumption applies with equal force to the appointment of a special judge. *Leonard v. Blair*, 59 Ind. 510, 514; *State v. Murdock*, 86 Ind. 124; *Rogers v. Beauchamp*, 102 Ind. 33; *Board, etc., v. Courtney*, 105 Ind. 311, 317; *Schlunger v. State*, 113 Ind. 295; *Mayer v. Haggerty*, 138 Ind. 628, 635. We find no error in the record. Judgment affirmed.

Cambria Iron Co. v. Union Trust Co.

THE CAMBRIA IRON COMPANY ET AL. v. THE UNION
TRUST COMPANY OF ST. LOUIS ET AL.

[No. 17,848. Filed Dec. 12, 1899. Rehearing denied March 7, 1900.]

PARTIES.—*Interpleader.*—*Practice.*—*Petition.*—*Sufficiency.*—One not a party, having an interest in the subject-matter of a pending action that may be adversely affected by the suit, will be permitted, upon a proper showing, under §278 Burns 1894, to come into the case for the protection of his interests, and such petition of intervention need not be as formal as a complaint, and is sufficient if it contains a succinct statement of the facts upon which the equities claimed are predicated. *p. 296.*

STREET RAILROADS.—*Franchises.*—*Street Improvements.*—*Paving Between Tracks.*—A franchise granting a street railway company the right to occupy the streets of a city conditioned that the street between the tracks shall be paved "when and as the street may be paved," requires the railway company to pave the space between its tracks when the street is paved. *pp. 297-301.*

MORTGAGES.—*Street Railroads.*—*Liens for Improvements.*—*Priority.*—A petition by an intervener, in an action to foreclose a mortgage against a street railway company, seeking to enforce a claim for material furnished for paving between the company's tracks as preferential to the mortgage, on the theory that the company materially increased the value of its property after the execution of the mortgage, is insufficient, where it is not alleged that the increase in value was made from the current earnings of the company. *pp. 297-303.*

SAME.—*Street Railroads.*—*Liens for Improvement.*—*Priority.*—Where, by its charter, a street railroad company was required to pave between its tracks when and as the streets occupied by it were improved, as a condition to the enjoyment of the franchise, such condition was carried into a mortgage executed by the company upon its property, and the lien of a material man for material furnished for paving between the tracks of the company is paramount to the lien of the mortgage. *pp. 303-307.*

APPEAL AND ERROR.—*Notice.*—*Appearance.*—In the absence of an appearance and declination, a co-appellant will be regarded as having joined in an appeal, where the record shows that notice of the appeal was given. *p. 308.*

SAME.—*Notice.*—*Appearance.*—Where a co-party appeared, assigned errors, and filed a brief in support thereof, such appearance cured any defects in the notice given by appellant. *p. 308.*

164	291
160	101
160	112
154	291
170	583

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From the Wayne Circuit Court. *Reversed.*

H. C. Fox, W. L. Taylor and A. C. Lindemuth, for appellants.

Seddon & Blair and John L. Rupe, for appellees.

HADLEY, C. J.—The Richmond City Railway Company had operated a railroad over the streets of the city of Richmond for many years with animal power, and in March, 1889, the city council passed an ordinance granting the company a new franchise for the period of fifty years, and authorizing the company to operate its street railroads by means of cable, electric, or animal power “or either or any of them” upon the conditions recited in the ordinance. The company accepted said ordinance, as amended, April 22, 1889, reorganized thereunder, and in January, 1890, to secure its 200 \$1,000 bonds executed to the now appellees its mortgage on all its property and “all rents, profits, tolls, issues, and income derived or arising therefrom”.

In 1892, it was deemed necessary and expedient by the common council of the city to pave with vitrified brick three squares of Main street, and, having adopted a declaratory resolution and ordinance therefor, gave notice to the Richmond City Railway Company to pave between its tracks on said squares “when and as the street was improved”. The company failing to comply with the notice, the city paved between the tracks when and as the street was paved, and, upon completion of the work, charged against the company the actual cost thereof, namely \$3,011.30, and demanded payment. The company failed and refused to pay the demand.

Thereafter, in April, 1893, the city, desiring to pave with brick twelve additional squares of Main street, entered into what is termed a compromise settlement with the street-car company of all disputes and liabilities of the company to pave between its tracks, and in the settlement agreement it was specifically stipulated, as declared by ordinance and

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acceptance thereof in writing, that the city should remit its claim of \$3,011.30 for the pavement already constructed, and that the company should thereafter pay for all such improvements between its tracks, if the cost thereof should be assessed against its property, under the provisions of the Barrett law; the same to become a lien and be enforced in the same manner as such assessments are enforced against abutting property owners.

After the agreement, in the summer of the same year, twelve squares of Main street were, by process of law, paved with brick. The work was performed and materials furnished by the Standard Paving Company under a contract it had with the city for that purpose. The actual and reasonable cost of paving between the company's tracks, for the twelve additional squares, was \$13,177.90, which was assessed against its right of way and property for payment in twenty successive semi-annual payments, in pursuance of the compromise agreement. It was stipulated in the contract between the city and the Standard Paving Company that the city should be liable, on account of said improvement, only for the cost of so much of the same as bordered on public grounds and for the crossings of streets and alleys, as provided by the ordinance and laws of this State. The railway company refused to pay any part of the sum so assessed against it for pavement between its tracks. The Standard Paving Company purchased the brick used in the improvement of said twelve additional squares from the Royal Brick Company and the Canton Brick Company, appellants herein, and, as part payment therefor, the Standard Company duly assigned in writing to said appellants all its interest in the claim against the street railroad company for paving between its tracks for the said twelve squares. Whatever rights and equities the Standard Paving Company acquired against the railroad company or its property, by reason of said improvements, were held by the Royal and Canton brick companies at the time of filing their petition of intervention. The com-

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pany, having made default in the payment of its obligations, secured by its said mortgage, the mortgagees, being the appellees in this case, brought their action in the Wayne Circuit Court for the foreclosure of their mortgage, and the appointment of a receiver; to which action the Richmond City Railway Company, the city of Richmond, and the Standard Paving Company, among many others, were made parties defendant.

It was alleged in the complaint that the Standard Paving Company was claiming to hold a lien against the mortgaged property paramount to the mortgage lien of the plaintiffs, which was unfounded; and the Paving Company was made defendant, and required to assert its lien, if it had any. The default in payment of the street-car company was alleged, the company voluntarily appeared and filed answer, and a receiver was appointed, qualified, and took full possession of the mortgaged property upon the same day the complaint was filed. Pending the formation of issues between the various parties, the appellants, Royal and Canton brick companies, without objection from appellees, obtained leave of court to file their intervening petition, and become parties to the action of foreclosure. The petition set forth with much detail the facts stated above, and particularly the franchise ordinance, the acceptance and reorganization thereunder, the adoption of electricity as a motive power, the paving of Main street with brick, notice to the railway company to pave between its tracks when and as the street was improved, its failure and refusal to do so, the doing of the work by the city, the assessment of the actual and reasonable cost thereof to the railway company, its refusal and failure to pay the same, the compromise agreement between the city and company, the performance of the conditions by the city and the non-performance by the company; that the Standard Paving Company as contractor with the city did the work and furnished the materials in the paving of the twelve squares of Main street; that the Standard

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Company purchased of these interveners all the brick used in paving said twelve squares, and in part payment therefor duly assigned to them in writing, which assignment is filed therewith, all rights and equities held by it against the street-car company; that the actual and reasonable cost of paving between the tracks of the railway for the distance of the twelve squares was \$13,177.90, which is due and unpaid; that, under its contract with the Standard Paving Company, the city is not liable for any part of said sum of \$13,177.90; that, after the execution of the plaintiff's mortgage, the railway company purchased and added to the mortgaged property, in machinery, equipments, and track extensions, property and improvements of the value of \$65,000. Prayer: That, in any judgment or decree that may be entered herein, the claim of these petitioners may be held a just lien upon the mortgaged property of the Richmond City Railway Company, and that, upon sale thereof upon decree of this court, the claim of these petitioners be ordered first paid, after payment of costs, out of the proceeds of such sale, and for all further proper relief.

The city of Richmond, appellant, also filed an intervening petition for the use of the Royal Brick Company et al. The plaintiffs filed a demurrer to the petition of the Royal Brick Company et al., (1) for insufficiency of facts; and (2) for defect of parties in this, that the Standard Paving Company was not made a party defendant. The plaintiff's demurrer was sustained, and the interveners refusing to plead further, and electing to stand by their petition, the court rendered judgment upon the demurrer against them, from which they appeal.

As shown by the briefs, the intervening petitions of all the other appellants have been fully settled out of court, and "the intervening petitions of the Royal Brick Company et al., and of the city of Richmond are based upon the same right, seek to enforce the same claim, and are substantially set forth in the same words." We will therefore consider

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only the questions arising upon the Brick Companies' petition. It is first claimed that the appellants have no standing in court, that they came in neither by complaint, cross-complaint nor answer, and that there is no such pleading known to our code as an intervening petition. While the code does not in terms recognize an intervener as a party litigant, yet this court has many times recognized in a party the attributes of an intervener in equity. *Barner v. Bayless*, 134 Ind. 600, 603, and cases cited; *State v. Bank*, 145 Ind. 537, 544.

It is the spirit of our code to settle in a single action the rights and equities of all persons interested in the subject-matter, and to simplify the rules of practice and pleading, as far as the same may be done, with due regard to the just determination of the controversy. To accomplish this end, therefore, one not a party, and having an interest in the subject-matter of a pending action that may be adversely affected by the suit, will be permitted by the court, upon a proper showing, under §273 Burns 1894, to come into the case for the protection of whatever right or interest he may have in the subject-matter. *Voorhees v. Indianapolis, etc., Co.*, 140 Ind. 220; *Zumbro v. Parnin*, 141 Ind. 430. And his pleading, as in this case, is neither a cross-complaint nor an answer, and hence not subject to the objections urged. It seeks neither to set up a cross action against the plaintiffs, nor to bar their right of recovery. The petitioners are interested in the subject-matter of the suit. Without intervention, the property may be sold, and pass forever beyond their reach. It is now in the custody of the law. The plaintiffs seek its sale and application to the payment of their debt. The common debtor and subject-matter are before the court, and the only relief sought is that, if the sale of the property is ordered, the equities of the interveners in the funds arising therefrom may be enforced against the plaintiffs. There can be no doubt of the remedy thus afforded a stranger to the suit to enter, by leave of court, for the

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timely protection of his interests; and a petition of intervention need not be as formal as a complaint, and is sufficient in form if it contains a succinct and definite statement or recital of the facts upon which the equities claimed are predicated. *Empire Distilling Co. v. McNulta*, 77 Fed. 700.

Appellees have suggested no specific infirmity in the facts alleged, and we are unable to discover any. The objection that the city of Richmond was not a party to the petition is unavailing under the demurrer as presented, and it is not urged that the Standard Paving Company, the petitioners' assignor, was a necessary party.

But it is earnestly urged that the ordinance conferring upon the Richmond City Railway Company the right to occupy the streets of the city of Richmond, exhibited with the petition, imposed no duty upon the railway company to pave between its tracks, and hence no lien, either preferential or specific, was created in the interveners' assignor for the construction of such pavement. With this contention we are unable to agree. In considering the question, it must be borne in mind that the following propositions of law have been by this court declared settled in this jurisdiction, viz.: (a) That a charter granted by a city, and accepted by a railway company, constitutes a contract between the city and company; (b) that such a charter must be strictly construed against the company; (c) that such company has no doubtful rights under such charter; (d) that where there are doubts they must be construed against the grantee, and in favor of the city. *Western Paving, etc., Co. v. Citizens St. R. Co.*, 128 Ind. 525, 530, 10 L. R. A. 770; *State v. Common Council*, 138 Ind. 455, 468; *City of Indianapolis v. Consumers, etc., Co.*, 140 Ind. 107, 116, 27 L. R. A. 514.

The first section of the franchise ordinance provides that permission and authority are hereby granted and fully vested in the Richmond City Railway Company, its successors and assigns, to lay, construct, operate, and maintain a single or

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double track street railroad, with all the necessary and convenient tracks etc., in and upon all the streets and alleys of said city, *subject to the conditions hereinafter mentioned*, to wit: "Sec. 2. The motive power of said street railway shall be cable, electric, or animal. Sec. 3. The tracks of said railroad shall be so laid as to conform to the established grade of the streets, and in such manner as to be no unnecessary impediment to the ordinary use of the streets and the passage of wagons or other vehicles along and across the tracks. Sec. 5. If the railroad is operated by electricity, the *streets*, wherever disturbed, obstructed, or damaged by reason of the construction, repair, or existence of said railroad, shall be by said company promptly restored to the same condition as they were prior to such disturbance and so maintained for one year thereafter. Sec. 6. The *side-walks, curbs, or gutters*, disturbed or injured in the erection of poles or wires, shall be by said company promptly restored and maintained for one year. Sec. 7. All tracks shall be laid in the middle of the street. Sec. 8. The center and cross wires shall at no point be at less elevation than eighteen feet above the rails. Sec. 9. The curb poles shall not exceed twenty-two feet in height. Sec. 10. The poles shall not be nearer together than 125 feet, with possible variations to avoid interference with shade trees and ingress and egress of property owners. Sec. 11. The poles shall be straight, smooth, and painted. Sec. 12. [As amended April 22, 1889.] In case electric power is used, the rail may be 'T' rail, and the street shall be graveled, paved, or macadamized up flush with top of rail upon the outside thereof, *when and as the street may be graveled, paved or macadamized, upon which the same are laid, and the street between the rails shall be graveled, paved, or macadamized, when and as the street may be graveled, paved, or macadamized, upon which the same is laid, upon a level with the top of the rail, and as near to the rail as the same can be done, leaving sufficient space only for the flange*

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of the wheel, and so maintained; and, in case animal power is adopted as the motive power, a flat rail shall be substituted on or before September 1, 1889, on Main street from Fourth street to Twenty-first street, and on North Eighth street from Main to North E street, and as far east on North E street as Tenth street. Said street railway shall have the right to extend its tracks in Glen Miller Park as now laid, as the said street railway and the committee on parks of said city may hereafter agree, subject to the approval of council. Sec. 17. Said Richmond City Railway Company hereby agrees to save said city harmless from any damage, loss, or liability occasioned by the construction, maintenance, or operation of said electric or other street railroad."

It is manifest from the foregoing conditions that it was the intention of the city, in granting authority to occupy its streets for private gain, to relieve the public so far as possible from inconvenience in the use of the streets, and from increased burden in their repair and maintenance. This is made clear by section three, which prescribes how the tracks shall be laid, and by sections five and six, which provide that wherever the streets, sidewalks, curbs, or gutters may be disturbed or damaged by the construction of the railroad, the company shall promptly restore the same to as good a condition as before the disturbance.

And what warrant have we for saying that things affixed to a grant, as conditions to its enjoyment, are not conditions at all, but covenants of the grantor? Furthermore, how may we single out from a class of statements, phrased in the same tense, and alike impersonal as to the party of performance, and say some are covenants of the grantor, and some conditions imposed upon the grantee? Yet this is what we are urged by the appellees to do. It is not claimed by appellees that the franchise ordinance imposed upon the city the duty of electing the kind of motive power to be used, as stated by section two, nor of laying the company's track to

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conform to the established grade of the streets, as described in section three, nor of erecting and painting its poles, as directed by sections ten and eleven, nor of stretching its wires not less than eighteen feet above the track, as required by section eight; but they do insist that it imposed upon the city the duty of paving between the company's tracks, when and as the street is improved, as required by section twelve; the insistence of appellees being that section twelve should be construed as merely declaratory of the mode of construction between the tracks that the city should thereafter observe when and as the street was improved upon which the track was laid. If it was the intention that the city should pave between the tracks, what reason was there for a specific covenant to do the work when and as the street was improved? Was it at all likely that the city would choose to do it at any other time? And, in the use of electricity, what concern should the railway company feel about the pavement between its tracks, whether graveled, macadamized, or bricked, or whether it was paved at all? And no reason is apparent, and none is suggested, why the city would voluntarily assume an obligation to pave in a particular manner, and at a particular time, in a contract that would conclude it for fifty years. Besides, the reading of the charter ordinance as a whole, and a consideration of the granting section, with the peculiar and uniform "shall be" in the enumerated conditions, upon which the grant is stated to depend, in the light of the rules of construction above announced, leads to the firm conviction that the adoption of the construction invited by appellees would be to subject ourselves to the irresistible construction that all the things enumerated as conditions of the grant are really covenants of the grantor. And this is not to be thought of. It must be said that they are all one or the other, and to doubt is to construe them against the company.

It is also a familiar principle that, when the terms of a written contract are uncertain, the courts will adopt that

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construction which the parties themselves place upon it. *Vinton v. Baldwin*, 95 Ind. 433; *Louisville, etc., R. Co. v. Reynolds*, 118 Ind. 170; *Pate v. French*, 122 Ind. 10; *Ingle v. Norrington*, 126 Ind. 174; *City of Vincennes v. Citizens Gas Co.*, 132 Ind. 114, 16 L. R. A. 485.

Much space is given to the discussion of the effect of the compromise ordinance of 1893, described in the early part of this opinion, upon the charter ordinance of 1889; but we fail to perceive its importance to the questions involved in this appeal. It does not repeal the charter ordinance of 1889, which supports and limits appellee's mortgage, either in terms or by implication. In fact, it is in aid of the charter by expressly declaring in its prefatory clause that it is "by way of a full settlement and compromise of said dispute"; that is, a full and final settlement and understanding of the extent of the company's liability under its charter of 1889. It was a definition of the franchise ordinance, not a repeal. It was nothing more nor less than an agreed construction of a disputed provision, and one which the court would be bound to adopt as between the parties. But, being subsequent to the execution of the mortgage to appellees, and without their approval, it was as to them nugatory. The mortgagees continue to hold the property as they received it from the mortgagor; and they received it in all respects as it was held by the mortgagor at the time the mortgage was delivered. The mortgagor had, therefore, no power to charge the mortgaged property by an unwarranted construction of its charter, nor impose any burden upon the security that did not exist at the time of the mortgage. Hence, appellants must find support for their claim under the charter ordinance of 1889, or they have nothing to rest it upon. On the other hand, the compromise ordinance of 1893, being a contract between the city and the mortgagor with respect to the latter's rights and liabilities under its charter, the appellees, as mortgagees, must accept their mortgagor's contract as a whole, or reject it altogether. They can not have the

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benefits without the burdens; that is to say, they can not accept their mortgagor's unauthorized contract to relieve themselves from appellants' preferential claim under the charter ordinance of 1889, and repudiate it to avoid the specific lien fixed upon the mortgaged property by the same instrument.

The new contract provides: "Said Richmond City Railway Company hereby agrees to pay all the cost of paving between the rails of its tracks on the residue of said Main street from the west line of Fourth street to the west line of Sixth street and from the east line of Ninth street to the east line of Twenty-third street, provided said improvement is made under the provisions of the Barrett law"; and the estimated cost shall be assessed against the property of said company, "and when adopted by the common council of said city shall be and constitute a valid lien upon all the real estate, right of way, tracks, rolling stock, and machinery of said company". It is specifically alleged in the intervening petition, and admitted by appellees' demurrer to be true, that the city performed all the conditions of said contract on its part, improved twelve of the squares of Main street, as provided for in the contract, and also paved between the company's tracks, pursuant to said agreement, at the actual and reasonable cost of \$13,177.90, which amount was assessed against the company's property, payable in twenty semi-annual payments, etc., in conformity to the provisions of the Barrett law, and that the company wholly failed and refused to pay the same.

Accepting the new contract as a whole, the paramount lien and debt of \$13,177.90 is admitted by appellees. Rejecting it as a whole, we must return to the ordinance of 1889, and dispose of this case as if the act of 1893 had not been passed.

The point made by appellees, that the theory of appellants' petition is that their lien is specific under the ordinance of 1893, and not preferential under the charter act of 1889,

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and that they must be confined to their theory, can not be accepted. If it is proper in any case—which we greatly doubt—for a court arbitrarily to declare a party's theory from his initial pleading, where the facts pleaded supply more than one, we are relieved of the task in this instance by the course of appellants' argument. Both ordinances are set forth in the petition at length; but the argument in this court, and which is entirely consistent with the pleading, goes to the effect and theory that the ordinance of 1893, designated by appellants as "supplemental" to the ordinance of 1889, should be accepted (1) as establishing a doubt in the charter as to the company's liability to pave between its tracks, and (2) as settling the doubt against the company by convention of the parties.

The most important question remains, namely: Does the petition exhibit such a claim as a court of equity will decree preferential payment from the proceeds of the sale of the mortgaged property? It is said in *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, by Waite, C. J., that "Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. * * * While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way."

It is alleged in the petition that after the execution of the mortgage, and after the commencement of the improvement of Main street, the company purchased and added to its property, machinery, dynamos, motors, street-cars, and electrical

apparatus to the value of \$50,000, and extended their tracks to the value of \$15,000. This material increase in the value of the mortgaged property is also admitted by the demurrer. And it is further said, with respect to such acts, in *Fosdick v. Schall*, 99 U. S. 235, on p. 254: "Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained."

The rule is restated by the same eminent jurist in *Burnham v. Bowen*, 111 U. S. 776, 788, 4 Sup. Ct. 675, 28 L. ed. 596, as follows: "That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." There has been no departure in any of the cases cited. It has been adhered to and reaffirmed in them all.

The rule has been applied only to railroad companies, and it is earnestly insisted that a street railway is not within the reason of the rule. It is said to operate in the administration of railroads on account of the public character of such institutions, and upon the assumption that they are of public concern and that a suspension of operation will work an actual detriment to the public. We can not see how the effect of

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suspension would be different. Both are transportation companies, both common carriers; and, if suspension in the operation of the one will be an injury to the general public, the suspension of the other will be an injury to the local public, and the difference is one of degree, and not of kind. The doctrine rests upon the principle of mutual benefit to the public, the mortgage and general creditors. If the value of the security is maintained, the system must be kept a going concern, and whatever is essential to this end, in labor, repairs, or equipment, must be protected by the highest degree of confidence to avoid the mischiefs of suspension.

But there can be no restitution where there has been no diversion; that is to say, where there has been no taking of the earnings needed for the payment of current obligations and applied in the betterment of the mortgaged property, there is nothing to be restored. And he who invokes the rule must show affirmatively that the mortgage creditors have got that which in equity belongs to the petitioner. If the mortgagor increases the value of the mortgaged property, from sources other than the earnings, the fact supplies no equity in the general creditor. In this case it is not averred in the petition that the purchase of the electrical equipment, cars, etc., was made from the current earnings of the company, and, for the absence of such averment, the petition must be held insufficient to bring the claim within the rule just considered. *Burnham v. Bowen*, 111 U. S. 776.

There is another kindred principle governed by the same general equitable doctrine that must be permitted to operate in this case. Every right the railway company has in the city of Richmond rests upon the franchise ordinance. It has no power to run a car, collect a fare, or encumber its property in any way, except subject to this ordinance. The obligation to pave between its tracks is of the essence of its being, and can no more be laid aside than its duty to pay its debts. It is written in its charter, and inseparable from it,

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and when the mortgagees accepted their security, they were bound to take the property as they found it, and bound to know that the rights they acquired in the property were subject to the burdens already imposed upon it. The right the appellants seek to enforce is more than a general claim for money, for it is a right blended with the right of the mortgagor to occupy and use the streets, and one which the mortgagees were required to take notice of and estimate in the acceptance of their mortgage. The liability does not rest upon a claim against the mortgagor, but upon the duty which arises out of the occupancy of the streets.

In *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, the owner of land conveyed, in 1873, to a railroad a right of way. It was incorporated in the deed, as a consideration, that the company should construct a board fence on each side of the railroad as soon as completed. The road was completed in 1876. In 1875, the company mortgaged all its property, and in 1883 the mortgage was foreclosed and property sold thereunder. The purchaser entered into possession, and began the operation of the road. No fence had been constructed, and, in 1886, the owner of the land brought suit against the purchaser; and in disposing of the case, the court says: "The appellant is in the possession of the right of way as the grantee of the original contractor, and it must take the benefit it enjoys subject to the burden annexed to it by the contract which gave existence to that benefit. It cannot enjoy the benefit and escape the burden, for the burden and the benefit are so interlaced as to be inseparable. The right to the benefit is so blended with the burden that equity and justice forbid a severance.

"One who takes a privilege in land to which a burden is annexed has no right to assert a claim to the privilege, and deny responsibility for the burden. A party who acquires such a privilege acquires it subject to the conditions and burdens bound up with it, and must, if he asserts a right to the privilege, bear the burden which the contract creat-

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ing the privilege brought into existence. * * *
In *Louisville, etc., R. Co. v. Power*, 119 Ind. 269, we said of a railroad company: 'Holding the land under the deed, as it did, it was bound to perform its contract. To permit it to retain the land and repudiate the deed would be against equity and good conscience.'

"In this instance the covenant written in the deed was an essential part of it, and the agreement to construct the fence was part of the consideration for the land. The case is near akin to that of a suit to enforce a vendor's lien; for here the deed upon its face exhibited the contract, and the facts open to observation showed that the covenant had not been kept. The facts open to observation did more than put the appellant upon inquiry; but had they done no more than put it upon inquiry, it could not justly claim the rights of a purchaser without notice. It must be held that the covenant in the deed through which the appellant claims, and the facts open to observation, imparted notice of the covenant, and notice also of its non-performance."

As before said, the right does not rest against the person, but it is affixed to the thing, and the mortgagees, or their grantees, may not have the thing without the obligation to discharge the right, for the right runs and abides with the property wherever it goes. We think, therefore, that the petition of intervention exhibits sufficient facts to show that the charter of the mortgagor company required it to pave between its tracks, when and as the street was improved, as a condition to its enjoyment, and that the condition was carried into appellee's mortgage, and that the claim of the petitioners, arising thereunder, is paramount to the lien of the mortgage.

Finally, it is objected that a judgment on demurrer to an intervening petition is not such a final judgment as may be appealed from. The judgment appealed from makes a final disposition of the case, so far as concerned the petitioners,

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and was sufficient to warrant the appeal. *Voorhees v. Indianapolis, etc., Co.*, 140 Ind. 220.

The judgment is reversed, with instructions to overrule the demurrer of appellees to the intervening petitions of the Royal Brick Company et al., and of the city of Richmond, and for further proceedings in accordance with this opinion.

ON PETITION FOR REHEARING.

HADLEY, C. J.—Appellees complain that we did not rule upon their motion to dismiss the separate appeal of the city of Richmond.

The motion was filed November, 1897. It was accompanied with no brief, nor was mention made of the same in any of the voluminous briefs filed by appellees on the merits. It therefore escaped our attention.

If, as stated, it is a fact that the city of Richmond did not perfect its separate appeal by filing a bond as of term, or by the service of notice upon parties in vacation, it does not follow that it is not in court. The record shows that notice to co-appellants in Wayne county was given March 20, 1896; and under §647 Burns 1894, the city will be regarded as having joined in the appeal, in the absence of an appearance and declination.

But the record affirmatively shows that the city of Richmond did appear and assign errors and on March 24, 1896, filed a brief in support thereof. This appearance cured all defects in the matter of notice, if any existed, and was sufficient to give the court jurisdiction. *Truman v. Scott*, 72 Ind. 258; Ewbank's Manual, §164, and cases cited; Elliott's App. Proc. §146, and cases cited.

Petition for rehearing overruled.

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CAMPBELL v. THE STATE.

[No. 19,096. Filed March 8, 1900.]

154	309
160	514
154	309
163	631

INDICTMENT.—*Sufficiency.—False Pretenses.*—An indictment for obtaining money by false pretenses, charging that C. did feloniously, etc., in writing, to wit: * * * Send me \$400 here by first express. K.,—pretend to the First National Bank of Vincennes, * * * that he was K., a depositor in said bank, is void for uncertainty, where it is not shown how the writing reached the bank, who wrote it, or procured its transmission, or that it was written without the consent of K. pp. 309-312.

SAME.—*False Pretenses.*—An indictment for false pretenses must directly negative the truth of the alleged false pretenses. p. 312.

From the Knox Circuit Court. *Reversed.*

J. E. McGaughey, W. A. Cullop and C. B. Kessinger,
for appellant.

W. S. Hoover and W. L. Taylor, Attorney-General, for State.

HADLEY, C. J.—Indictment in two counts for obtaining money under false pretenses. Motion to quash each count overruled. The defendant successfully moved the court to require the State to elect upon which count it would place the defendant upon trial. The State elected the first count. Conviction, and judgment of imprisonment in the Indiana Reformatory.

The errors assigned call in question the action of the court in overruling the motion to quash each count of the indictment.

Omitting the formal parts, the indictment follows: "First count. That one John W. Campbell, late of said county, on the 22nd day of January, A. D. 1897, at said county and State aforesaid, did then and there unlawfully, feloniously, knowingly, and falsely, in writing, to wit: 'Received at Vincennes, Ind., 9:20 a. m. January 22nd, B. & Q. 9 paid. Bruceville, Ind., 22. The First National Bank: Send me

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\$400 here by first express. J. H. Klingler',—pretend to the First National Bank of Vincennes, Indiana, with intent then and there, and by such false pretenses, to cheat and defraud the said bank, for the purpose of fraudulently obtaining from said bank the sum of \$400, that he, the said Campbell, was one John H. Klingler, a depositor in said bank, and the said bank and the officers thereof relying upon the said representations of the said John W. Campbell, and his false pretenses as aforesaid, and believing the same to be true, and being deceived thereby, and having no means of ascertaining the contrary, did then and there upon said day send to said Campbell, at said Bruceville, Indiana, the sum of \$400, of the good and lawful money of the United States of America, of the value of \$400, said money being then and there the property of the said bank; and the said Campbell did on said 22nd day of January, 1897, receive said money, and convert the same to his own use, contrary, etc.

"Second count. * * * One John W. Campbell did then and there unlawfully, feloniously, knowingly, and falsely pretend and represent to one Lewis H. Lee, who was an authorized and acting agent of the Adams Express Company, a corporation or stock company doing an express business within said Knox county, Indiana, that he, the said Campbell, was one John H. Klingler, a depositor in the First National Bank of Vincennes, Indiana, with intent then and there, and by such false pretenses, to cheat and defraud the said Adams Express Company, for the purpose of fraudulently obtaining \$400 from the said Adams Express Company; and the said Campbell on said day procured and induced the said Lewis H. Lee to send to the said First National Bank of Vincennes, Indiana, a telegraphic message written by the said Campbell, said message being in words and figures as follows, to wit: 'Received at Vincennes, Ind., 9:20 a. m. January 22nd B. & Q. 9 paid. Bruceville, Ind., 22. The First National Bank. Send me \$400 here by first express. J. H. Klingler;' and said mes-

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sage was delivered to the officers of said bank on said day, and said officers of said bank immediately on said day sent to said Bruceville to be delivered to said Campbell by said Lee, agent as aforesaid, the sum of \$400 in money, as requested and directed in said telegraphic message, and the said Lee received said money on said day, and the said Lee, relying upon said representations of the said John W. Campbell, and his false pretenses as aforesaid, and believing the same to be true, and being deceived thereby, and having no means of ascertaining the contrary, did then and there upon said day deliver to said Campbell the said money, it being the sum of \$400 of the good and lawful money of the United States of America, of the value of \$400, said money being the property of the said Adams Express Company; and the said Campbell did on said day receive said money, and convert the same to his own use, contrary, etc.”

Certain well settled legal principles must be applied in the construction of this indictment: (1) Words must be employed which import with reasonable certainty the facts essential to the crime charged. *Funk v. State*, 149 Ind. 338, 340; *State v. Locke*, 35 Ind. 419; *Jones v. State*, 50 Ind. 473. (2) The averments must show a coherent and consistent connection between the pretenses and accomplished fraud. *Jones v. State, supra*; *Cooke v. State*, 83 Ind. 402; *Johnson v. State*, 75 Ind. 553; *Funk v. State, supra*. (3) The indictment must in express terms negative the truthfulness of the pretenses. *Johnson v. State, supra*, 555; *Pattee v. State*, 109 Ind. 545; *Funk v. State, supra*; *State v. Smith*, 8 Blackf. 489.

In respect to the first count, being the one upon which the defendant was tried and convicted, it is averred that Campbell did feloniously, falsely, etc., “in writing, to wit: * * * Bruceville, Ind., 22. First National Bank. Send me \$400 here by first express. J. H. Klingler”,—pretend to the First National Bank of Vincennes, with intent then and there, and by said false pretenses, to cheat and defraud the

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said bank, that he was John H. Klingler, a depositor in said bank; that said bank relied upon said representations, and, believing the same to be true, did then and there send to said Campbell, at Bruceville, the sum of \$400.

It is not averred that the writing was a telegram, or how it reached the bank, or who presented it, or whether accompanied by any verbal explanation; but if we may infer that it was a telegram sent from Bruceville, then it does not appear who wrote it, or procured its transmission, or whether with or without the authority of Klingler. It is alleged that the bank, being deceived by the writing, sent the money to Campbell at Bruceville; but as the writing was subscribed in the name of Klingler, and requested the sending of the money to Klingler, who was entitled to it, we are unable to perceive how the bank could have been misled by the writing alone into sending it to Campbell. If a telegram, we must take notice that the signature, as well as the body of the instrument, was in the handwriting of the receiving telegraphic agent; and, if delivered to the bank in the usual course of business, what ground did it furnish the bank for sending the money to any one but Klingler? In other words, if the bank did not send the money to Klingler at Bruceville, as requested by the writing, but, in disregard of the request, sent it to another, to whom shall the consequences of a departure from instructions belong? The first count of the indictment abounds in uncertainty and in the want of a consistent connection between the pretenses and accomplished fraud, and for these reasons can not be sustained. The first count is fatally defective for the further reason that there is no direct negation of the alleged pretenses.

Judgment reversed, with instructions to sustain the motion to quash the first count of the indictment. The clerk will issue the proper notice for the return of the prisoner to the sheriff of Knox county.

Ladd v. Kuhn.

LADD v. KUHN ET AL.

[No. 19,203. Filed March 8, 1900.]

APPEAL AND ERROR.—Parties.—Dismissal.—Where suit was brought for partition of real estate, and defendant notified his remote grantor, who appeared and defended same in the name of the original defendant, showing in his application that defendant had taken no interest in the defense of the suit, and that he was obliged to defend the same or incur liability to said defendant on his covenants of warranty, an appeal taken by such grantor, in the name of defendant, from a judgment granting partition, will not be dismissed upon motion of such defendant, where it appears that the appeal bond was executed by the grantor and the cost of transcript paid by him.

From the Grant Circuit Court. *Motion to dismiss appeal overruled.*

A. E. Steels and *J. A. Kersey*, for appellant.

G. A. Henry and *P. H. Elliott*, for appellees.

JORDAN, J.—Appellees instituted this action against Boyd Ladd for the partition of forty acres of land. The facts pertinent to the question involved, on the motion to dismiss this appeal, appear to be as follows: In October, 1890, William Friermood, by his warranty deed, conveyed the land in question to William A. Friermood. In September, 1891, the latter, by a warranty deed, conveyed it to George W. Parsons. Parsons, in November, 1894, by his warranty deed, conveyed the premises to Boyd Ladd, the nominal appellant herein. The record further discloses that, after the commencement of this action by the appellees, in which they claimed to be owners of the undivided two-thirds of the land in dispute, said Ladd, who was the sole defendant, notified the said William Friermood, as his remote grantor, to defend the action. The notice was to the effect that he, Ladd, would hold said Friermood liable on his covenants of warranty in case the plaintiffs should recover in the action. In pursu-

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ance of said notice, it is disclosed by the record that Friermood appeared in court, and presented his verified application to be permitted to file an additional answer to the complaint. In his application, among other things, he alleged that the defendant, Ladd, had taken no interest whatever in the defense of the suit, and that he, Friermood, was obliged to defend the same, or incur liability to said defendant on his covenants of warranty, etc. The record recites that this application was sustained by the court, and Friermood filed fifth and sixth paragraphs of answer. These were filed in the name of the defendant, Ladd, and are set forth in the record.

There was a trial by the court, and a finding in favor of the plaintiffs in respect to their title and right to partition, and a further finding that the land was not susceptible of division; and, over a motion for a new trial, filed in the name of the defendant, Ladd, judgment for the sale of the real estate was rendered. From this judgment this appeal appears to have been prosecuted by the said William Friermood. The appeal bond was executed by him and one Zach T. Friermood and recites that Boyd Ladd has appealed from the judgment to the Supreme Court, for the use of the said William Friermood, his grantor. It further appears that the said Friermood paid the cost incurred in procuring a transcript for this appeal, and immediately after the assignment of errors, which is in the name of Ladd, the following notice appears: "William Friermood, a remote grantor of the appellant * * * became a privy to the proceedings and judgment herein, and prosecutes this appeal in appellant's name, furnishing appeal bond, and paying all costs and expenses. [Signed] Steele & Kersey, Attys. for appellant." After this cause had been submitted, and after a brief for appellant had been filed, Ladd moved to dismiss the appeal as a matter of right. This motion Friermood resists, upon the ground that he, at least, under the facts, is constructively a party to the action, and has such an interest in the result therein that he is entitled to maintain the appeal.

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As a general rule, an appellant, in an appeal to this court, may dismiss his appeal. This general right, however, is subject to exceptions, and can not be exercised under any and all circumstances. Elliott's App. Proc. §534; Ewbank's Manual, §232.

It is virtually conceded by counsel for Ladd that Friermood, who has been brought into this action as a warrantor of the title in dispute, has an interest in maintaining this appeal; but it is insisted that because he neglected to cause himself to be made a party defendant in the place of Ladd in the action in the lower court, so as to become a party to the judgment, he has thereby forfeited his right to appeal. It is not sufficient, in order to entitle a person to maintain an appeal, to show that he is merely a party or privy to the proceedings, but it must also appear that he possesses an appealable interest in the cause. Such an interest is said to exist when the judgment or decree so affects a party or privy thereto that he would derive substantial benefit from its modification or reversal. Elliott's App. Proc. §132; 2 Ency. of Pl. & Pr. pp. 151, 160, 161.

Affirming, as we do, the above to be substantially a correct statement of the law, we may next inquire whether Friermood is shown to occupy such a position, under the circumstances, as to authorize him to maintain this appeal. He, as the facts disclose, was a remote grantor and warrantor. The covenants in his deed in regard to warranty of title are real covenants, and run with the land. They followed the subsequent conveyances of the premises, and passed from one purchaser to another through each successive link in the chain of title; and Ladd, if evicted by a paramount title, might sue either his immediate or remote warrantor. *McClure v. McClure*, 65 Ind. 482; *Martin v. Baker*, 5 Blackf. 232.

After the commencement of this case, Ladd, it appears, notified Friermood, as his remote warrantor, to come into the action and defend it, which the latter seems to have done

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in the name of the former. By giving this notice, Ladd thereby relieved himself of the burden of defending the suit, and might thereafter, in good faith, abandon the suit, and leave Frierhood to successfully defend it, or, by an adverse judgment, be forever bound and precluded in respect, not only to the eviction of Ladd, but also that such eviction was the result of a claim under a paramount title. In the event of an adverse judgment, under the circumstances, Ladd was not required to appeal therefrom, but he might yield thereto, and sue Frierhood upon his covenants of warranty. *Morgan v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544.

The practice of giving notice in such cases is as old as the covenants of warranty, and is analogous to the ancient practice of "voucher to warranty"; and the reason therefor arises out of the familiar doctrine that a person ought not to be bound by the judgment in an action to which he was not actually or constructively a party. *Morgan v. Muldoon*, *supra*.

The ancient writ or process by which a warrantor was "vouched in", as the real party defendant to the action, and thus made to defend the title there in question, was denominated "voucher". This process was to the effect that the same judgment which deprived the warrantee of that which had been conveyed to him was also a judgment against his warrantor, and gave the former a right to other lands of equal value to those which had been lost. Rawle on Covenants, §11. In analogy, then, to this ancient practice, which became obsolete in England long before it was finally abolished by statute, a general practice in this country has prevailed that, when an action is brought to enforce a paramount claim of title against one who is protected by covenants of warranty, the warrantee can, by giving the proper notice to his warrantor, relieve himself from the burden of being compelled to prove, in an action to recover on the covenants, that he was evicted by a claimant under a paramount title. In such an action, in the absence of fraud or collusion, a warrantor will not be permitted to prove that a recovery

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against the warrantee was not due to a paramount title. Rawle on Covenants, §117.

In *Morgan v. Muldoon*, 82 Ind. 347, Lansing Morgan, the warrantor, under the same method as that employed in the case at bar, was brought into the action and by the court permitted to defend. Before the rendition of the judgment therein, he died. It was insisted in that case that after his death, and the abatement of the action as to him, the record must be regarded as though he had not appeared in the suit. On page 355 of the opinion, upon the petition for rehearing, this court said: "Lansing Morgan was not, in fact, a party when the judgment was rendered. Proof of proper notice to him would make him constructively a party to the judgment. The record might be used as evidence for the purpose of showing notice to him, though he was not an actual party to the judgment, and thus a record, considered as a memorial of proceedings that transpired in a court of justice, in which respect it is conclusive against strangers, would establish the conclusiveness of the judgment as *res judicata*."

While it is true that Frierhood, the warrantor in this case, might have appeared and defended in his own name, yet the fact that he defended in the name of Ladd does not any the less make him constructively a party to the proceedings. He did not come into the case in the attitude of a stranger, but was made a party, under the method pursued by operation of law, and must certainly, under the circumstances, be accorded the same means and advantages of controverting the title asserted by the plaintiff as though he were the real party defendant. Generally speaking, a person is said to be in privity when he is so connected with another person in an estate, a right, or liability, as to be affected in like manner. Anderson's Law Dictionary, 813. The judgment below affects both Ladd and Frierhood, his warrantor, and the latter is interested in securing a reversal thereof. Being bound by the judgment, he would certainly be considered as benefited by its reversal, and therefore can be said to have an appealable interest therein.

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In *Howse v. Judson*, 1 Fla. 133, it is affirmed, as a general rule, that none but parties to a record or privies can maintain a writ of error, but that where one is made a party by law, "as he who comes in as vouchee", he occupies the position of a privy and may prosecute the writ. In *Eaton v. Lyman*, 26 Wis. 61, the court said: "Where a grantee seeks to conclude a grantor in an action on the covenants of the deed, by the result of the suit in which the grantee was ousted under an alleged paramount title, it should appear, not only that the grantor was notified of the suit and requested to defend it, but that he was allowed to do so to the utmost extent of the law, if he desired to. Otherwise a defendant in ejectment might acquiesce in an erroneous result of a trial, and refuse his grantor an opportunity to correct it by appeal, and still conclude him by the judgment in an action on his covenants. This would be clearly unjust." See *Freeman on Judgments*, §181.

Friermood, it is true, is not named in the judgment below, but, as we have seen, he is as much bound by it as though he was specially named or mentioned therein. *Brooks v. Dorey*, 72 Ind. 327.

In the appeal of *Ragland v. Wickware*, 27 Ky. (4 Marshall) 530, it was held that a person, in whose name a writ of error is prosecuted, will not be permitted to dismiss it if the court is satisfied that the writ is prosecuted for the benefit of another. Ladd, having brought Friermood, as a warrantor, into the action, and required him to defend, can not now, under the circumstances, claim the right to dismiss the appeal merely because it is prosecuted by Friermood in the name of the former. Ladd, under the circumstances, is but a nominal appellant, and Friermood must be considered as the real appellant; and the former will not be liable for any cost or expenses occasioned by the appeal. It follows that Friermood is entitled to maintain the appeal, and the motion to dismiss it is therefore overruled at the cost of the mover.

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GARRETT v. BISSELL CHILLED PLOW WORKS.

[No. 19,750. Filed March 9, 1900.]

LIBEL.—Complaint.—Innuendo.—It is the office of the innuendo to explain, not to extend or enlarge, the meaning of the words used, and if words not libelous *per se* are charged, the absence of inducement showing by extrinsic matter that the words are actionable is not supplied by an innuendo attributing to the words a meaning which renders them actionable. p. 320.

PRACTICE.—Harmless Error.—Available error cannot be predicated upon the action of the court in sustaining a demurrer which was defective in form, where the complaint to which it was addressed was insufficient for want of facts. p. 321.

From the St. Joseph Circuit Court. *Affirmed.*

George G. Feldman, for appellant.

A. Anderson, J. Du Shane and W. G. Crabill, for appellee.

MONKS, J.—This appeal is from a judgment in favor of appellee on demurrer to appellant's complaint for libel.

The complaint was in two paragraphs, which were substantially the same, and predicated upon the following letter: "Office of Bissell Chilled Plow Works, South Bend, Ind., May 15, 1897. Mr. M. J. Bufanger, Granger, Ind. Dear Sir: The plow that Mr. Garrett used is ours, and if you will deliver it to E. F. Rhoades he will try and sell it for us, or if you can sell it for \$30 we will give you \$5 for selling it. If you will send us a draft for \$25 you may have the plow. Truly yours, Bissell Chilled Plow Works, E. C. Westervelt, Pres. & Treas."

It is admitted by appellant in his brief that the letter is not libelous *per se*. The part upon which he predicated his right to recover reads as follows: "The plow that Mr. Garrett used is ours." Unless the extraneous matter set forth by way of inducement makes the letter libelous, the court did not err in sustaining the demurrer to the complaint.

154	319
155	86
155	415
154	319
158	96
154	319
167	68
167	381

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It is alleged in the first paragraph of complaint, by way of inducement, that appellant is, and has been for many years, a resident of St. Joseph county, Indiana, and has had and still has control of a farm in said county, which was farmed by himself and his tenants; that for some time prior to the delivery of said letter to said Bufanger, he had owned a riding plow which he had used on his farm, and which he had sold for \$45 to said Bufanger, to whom he had rented said farm. From these allegations, considered in connection with the statement in said letter,—“the plow that Mr. Garrett used is ours”,—the inference drawn by appellant, and alleged in said first paragraph of complaint, was that appellee thereby charged that appellant was guilty of the crime of embezzlement, had feloniously appropriated and converted property of appellee to his own use, was guilty of obtaining money and property under false pretenses, and by false representations, and of feloniously, wrongfully, and unlawfully disposing of defendant's property.

It is the office of the innuendo to explain, not to extend or enlarge, the meaning of the words. An innuendo cannot aver a fact or change the ordinary meaning of language. If words not libelous *per se* are charged, the absence of inducement showing by extrinsic matter that said words are actionable is not supplied by an innuendo attributing to those words a meaning which renders them actionable. *Hays v. Mitchell*, 7 Blackf. 117; *Stucker v. Davis*, 8 Blackf. 414; *Harper v. Delp*, 3 Ind. 225, 231, 232, and cases cited; *Ward v. Colyhan*, 30 Ind. 395; *Hart v. Coy*, 40 Ind. 553; *Rock v. McClarnon*, 95 Ind. 415; *Seller v. Jenkins*, 97 Ind. 430; Townshend on Sl. and Lib., §§335, 336; 13 Am. & Eng. Ency. of Law, 465, 466; 13 Ency. Pl. & Pr. 51, 52, 53, 54. Words are to be understood in their plain and natural import, according to the idea they are calculated to convey to those to whom they are addressed. In ascertaining the meaning, reference must be had to the words used and the circumstances under which they were uttered, and

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the author is presumed to have used them in the sense which their use is calculated to convey to the minds of the hearers. *Seller v. Jenkins*, 97 Ind. 430; Townshend on Sl. & Lib., §§133, 137. While a written publication may be libelous, and the same words, if spoken, would not be slanderous, yet the rule for the construction of the language used, whether written or oral, is the same. Townshend on Sl. & Lib., §133.

The construction to be put upon the part claimed to be libelous, when construed in connection with the extrinsic facts alleged, must be that which is consistent with the entire letter. When viewed in this light, in connection with the extrinsic facts alleged, the letter will not reasonably bear the meaning attributed to it by the innuendo; the letter contains no insinuation of fraud, criminal intent, or moral turpitude on the part of appellant. The letter was about a plow which appellee claimed to own, and not concerning appellant, and his name was only used to identify the plow. Whether or not extrinsic facts might be alleged which would make said letter libelous, we are not required to determine.

Appellant insists that the court erred in sustaining appellee's demurrer to the second paragraph of complaint, for the reason that said demurrer was so defective in form as to present no question for decision. The demurrer was as follows: "Defendant demurs to the second paragraph of said amended complaint for the reason that the facts therein stated do not constitute a ground of defense." While such a demurrer is not proper in form, and it would not have been error if the court had overruled the same, yet, as said paragraph of complaint was insufficient for want of facts, the error of the court in sustaining the demurrer thereto was harmless. *Davis v. Green*, 57 Ind. 493; *Hadley v. State*, 66 Ind. 271; *Palmer v. Hayes*, 112 Ind. 289; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 378; *Goldsmith v. Chipps*, ante, 28; Ewbank's Manual, §§354, 358; Elliott's App. Proc. §637 p. 563.

Judgment affirmed.

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154	322
158	184
158	424

154	322
161	704

154	322
163	538

154	322
168	383

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY *v.* THE INDIANA
HORSESHOE COMPANY.

[No. 18,395. Filed March 13, 1900.]

APPEAL AND ERROR.—*Motions.*—*Record.*—No question is presented on appeal as to the ruling of the court upon a motion to make a complaint more specific, where the motion and ruling of the court are not made a part of the record by bill of exceptions or by order of the court. *p.* 324.

RAILROADS.—*Construction of Side-Track.*—*Care of.*—*Contract.*—A contract between a railroad and manufacturing company for the construction of a side-track to the factory, wherein the manufacturing company agreed "to exercise the greatest care in the management of the siding herein provided for; to prevent cars or other obstructions from getting out upon, or too close to, the main or other tracks; to secure the safe closing and locking of the main switch or switches, and to keep the inner safety switch in proper position; also to use such means and care generally as will tend to avoid accidents of any kind," did not require the manufacturing company to keep the tracks belonging to the railroad company clear of rubbish and combustible material. *pp.* 324-326.

SPECIAL VERDICT.—*Railroads.*—*Fires.*—*Damages.*—A finding in an action for damages for the destruction of property by fire communicated from defendant's railroad, that defendant permitted dry weeds and grass and other combustible material to be and remain upon its right of way from which fire, dropped from defendant's engines, spread to plaintiff's property, is sufficient, without a finding as to the amount and extent of the combustible material permitted to accumulate, or that permitting the weeds and grass to remain upon the track for two weeks was unnecessary, or increased the hazards to plaintiff's property. *pp.* 326-330.

RAILROADS.—*Fires.*—*Negligence.*—Where a railroad company negligently permitted dry grass and weeds and other combustible material to accumulate upon its right of way, it is liable for damages to property caused by fire spreading therefrom, although it had no knowledge of the existence of the fire. *p.* 330.

CONTRIBUTORY NEGLIGENCE.—*Railroads.*—*Fires.*—*Damages.*—The owner of a building situated near a railroad is not, by his failure to watch and guard the building, guilty of such contributory negligence as to prevent a recovery for the destruction thereof by fire escaping from the railroad, although he was aware that combustible material had been permitted to accumulate upon the right of way. *p.* 331.

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RAILROADS — Fires. — Evidence. — Negligence.—In an action for damages for the destruction of property by fire escaping from defendant's railroad, plaintiff is not required to prove by direct evidence that the fire started on its right of way, and that defendant was negligent in permitting the fire to escape therefrom. *p. 333.*

EVIDENCE. — Railroads. — Fires. — Negligence.—In an action for damages to property caused by fire escaping from defendant's railroad, based upon the negligence of defendant in permitting combustible and inflammable material to accumulate upon its right of way, evidence that fires were set by defendant's engines near the time of the fire in question, and near the same place, the place where the fire was set being on an up-grade, was properly admitted for the purpose of showing the negligence of defendant in permitting the combustible material to accumulate at such place. *pp. 335, 336.*

SAME. — Harmless Error. — Fires. — Value of Property.— Available error cannot be predicated upon the action of the court, in the trial of an action for damages for the burning of a factory, in permitting a witness to testify to the value of the property as a manufacturing plant, when the suit was brought for separate items of loss, where the facts found showed that damage was assessed at the market value of the property destroyed. *p. 337.*

APPEAL AND ERROR. — Motions. — Record.—A motion to require the jury to make their answers to interrogatories more specific, and the ruling of the court thereon, can only be made a part of the record on appeal by bill of exceptions or by order of court. *p. 337.*

From the Wabash Circuit Court. *Affirmed.*

Samuel Parker, N. O. Ross and G. E. Ross, for appellant.
W. G. Sayre, J. S. Slick, N. G. Hunter and H. J. Paulus, for appellee.

MONKS, J.—This action was brought by appellee against appellant to recover the value of a building, machinery, tools, and materials alleged to have been destroyed by fire through the negligence of appellant. Issue, trial, special verdict under the act of 1895, and judgment for appellee. The errors assigned, and not waived, are: (1) The court erred in overruling appellant's motion to require appellee to make each paragraph of the complaint more specific, definite, and certain; (2) the court erred in overruling appellant's demurrer to the first paragraph of the complaint; (3) the court erred in overruling appellant's demurrer to the third paragraph

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of the complaint; (4) the court erred in overruling appellant's motion for a judgment in its favor on the special verdict; (5) the court erred in overruling appellant's motion for a new trial.

As the motion to make each paragraph of the complaint more specific, definite, and certain, and the ruling of the court thereon are not made a part of the record by a bill of exceptions, or order of court, no question is presented by the record for our consideration. *City of Seymour v. Cummins*, 119 Ind. 148, 150, 5 L. R. A. 126; *Boyce v. Graham*, 91 Ind. 420, 421; *Indiana, etc., Co. v. Millican*, 87 Ind. 87, 89; *Manhattan Ins. Co. v. Doll*, 80 Ind. 113, 115; *Ewbank's Manual*, §26.

All the paragraphs of complaint were withdrawn except the first and third. The allegations in said first and third paragraphs concerning appellant's negligence are substantially the same as the complaint in *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273, 4 L. R. A. 549, which was held good. Under the law, as declared in that case, and the cases therein cited, each of said paragraphs was sufficient to withstand the demurrer for want of facts. The court did not err, therefore, in overruling the demurrer thereto.

There was no error in sustaining appellee's demurrer to the second paragraph of answer. The facts alleged in the first and third paragraphs of complaint show that the road-bed, tracks, and siding were under the exclusive control, use, management, and possession of appellant as a part of its right of way, and that appellant on the 22nd day of August, 1895, and for a long time before that day, negligently suffered and caused the same to be covered over with dry weeds, grass, straw, paper, wood, and other rubbish adjacent to and adjoining the land on which appellee's factory and buildings were located. The theory of said second paragraph of answer to said paragraphs was that appellee was not entitled to recover because in the written contract entered into between appellant and appellee, by which appellant was to,

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and did, build a siding or switch from its main track to appellee's factory, appellee agreed to look after and keep it clean, and that it was negligent in permitting paper, weeds, and other combustible matter to accumulate thereon, and that the fire dropped from appellant's engine started there and spread therefrom to the factory. The part of said written contract which bears upon the question involved reads as follows: "The second party [appellee] agrees to exercise the greatest care in the management of the siding herein provided for; to prevent cars or other obstructions from getting out upon, or too close to, the main or other tracks; to secure the safe closing and locking of the main switch or switches, and to keep the inner safety switch (where such switch is provided) in proper position; also to use such means and care generally as will tend to avoid accidents of any kind." It was expressly provided in said contract that appellant should have the right to use without cost the whole or any part of said switch in connection with other business than that of appellee, provided such use did not interfere with the business of appellee. The whole of said siding, including the part upon appellee's lot, was built by, and to be kept in repair by, appellant, and was the property of appellant, with the right to enter and remove the same upon notice. It is evident that the part of said contract included in quotation marks did not require appellee to keep appellant's right of way and tracks adjacent to appellee's lot upon which said factory was constructed free from and clear of combustible material such as described in the complaint. Said provision was made with reference to appellee's duties when using said siding for the convenience of its factory in receiving and shipping goods, and such duties were confined to the cars and other obstructions upon the switch for the transaction of that business, and the exercise of due care to avoid accidents of any kind arising from said use of the switch by appellee, and it was not its duty to give any attention or care to the right of way, track, or switch of

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appellant. Counsel for appellant call attention to a clause in said contract in regard to appellee's duty in erecting buildings, and claim that appellee violated the same, but as no breach thereof is alleged in said second paragraph of answer, we are not required to consider said clause.

It is next insisted that the facts found in the special verdict do not show that the injury and loss sued for occurred on account of the negligence of appellant, and without the fault of appellee. The facts found bearing upon this question are substantially as follows: That on and prior to August 22, 1895, appellee owned a factory building on lot eighteen, in Tibbett's addition to the city of Marion, Indiana, which was constructed of wood; said lot, being 140 feet long, north and south, and seventy-two feet wide, east and west, abutted upon the north side of appellant's right of way; that on and prior to said day the appellant used and occupied a strip of ground about seven and one-half feet wide off of the south end of appellee's said lot for its spur and part of its right of way; that from the center of appellant's main track to the north side of its said spur was about forty-seven and one-half feet; that on and prior to said day the appellant had charge and control of the right of way upon and along which its railroad ran through the city of Marion, and also had charge and control of the numerous switches and side-tracks upon and along its said right of way through said city, and that said switches and side-tracks extended east and west along the north and south sides of its main track, and from a point west of appellee's said lot to a point east thereof several hundred yards; that about three years prior to said day the appellant constructed said spur track upon and across said strip of ground off of the south end of said lot, and that during all of said time the same was used and maintained by appellant as a part of its right of way, as a place for storing its cars when not in use, and that all said switches and side-tracks, including said spur, during all said time, were in common use by appellant for handling and storing its trains

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and cars, and that said strip of ground was in the exclusive occupancy and control of appellant; that appellee's said building was sixty-nine feet wide from east to west, and the south end of said building was about five feet north of the north rail of said spur; and appellee maintained a wooden porch against and across the south end of said building, which was about three feet wide; that on and prior to said day appellant, at the point where appellee's factory was located, and extending east and west thereof, maintained and used its main track, two side-tracks south of said main track, one side-track north of its said main track, and the spur track north of said north side-track, and leading to and along said porch of appellee's factory; that on said day the appellant's right of way, opposite appellee's factory, from its north line to a point about three feet north of the north rail of its north side-track, and for a distance of several feet east and west of appellee's lot, was covered with dry, combustible, and inflammable material, to wit, grass, weeds, straw, paper, shavings, and wood, railroad ties, and other timber; that said weeds and grass were cut about two weeks before the 22nd day of August 1895 by appellant's servants and employes, and were left lying upon and along said right of way at the place named; that a large portion of said paper and straw was so upon said right of way by having been thrown or dropped from appellant's cars; that said combustible and inflammable matter had accumulated upon said right of way at least two weeks before said 22nd day of August, 1895, and the employes of appellant, upon whom rested the duty by their employment, to remove from said right of way all such combustible matter and material, during said summer of 1895, passed over said right of way at said point almost daily; that during the months of June, July, and August, 1895, the weather was very dry, and during said time said combustible matter became and was very dry and highly inflammable, and was at all times during its existence there exposed to and in danger of ignition

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from appellant's engines; and was of such a character that a fire started therein would follow the same, and burn across the said switches to appellee's factory building; that the tracks and spur hereinbefore described constituted appellant's railroad yard at Marion, and appellee's factory was located on the north side and about the center of said yard; and appellant on and before said day kept a suitable engine at said city of Marion, and then had the same in daily use upon said tracks in said yard for shifting and handling its trains and cars; that on and prior to said day appellant was operating trains of cars over its said tracks, and through said yards, averaging about one train each hour, in each direction, during the day, and, in approaching and passing appellee's factory, the engines drawing said trains used a great amount of steam; that on said 22nd day of August, 1895, one of appellant's cars was standing on said spur track, at a point thereon and adjacent to and just south of appellee's said building; that the doors of said car were open on both sides, and that in said car there was a considerable quantity of dry combustible paper; that on said day, between the hours of 9 and 10 o'clock a. m., said dry and combustible material on appellant's right of way at said point was ignited, and set to burning, at a point southwest of said buildings, by fire emitted from appellant's locomotive engines, then and there operated by appellant along and upon its said main track; that on said day, at and during the fire, the wind was blowing from the southwest to the northeast; that said fire traveled continuously through said combustible material to the north side of said right of way, and ignited into flames said car so standing upon said spur, and was communicated to and into appellee's said porch and building; that said fire from where the same was so set on said right of way was a continuous fire until it reached over the intervening space to and into appellee's said building, and that from the point on said right of way where it began it continued to spread and burn through said combustible material on said right of way

until it reached appellee's building, and said building was then and there rapidly destroyed and consumed by said fire; that nothing was done by the appellant to prevent it from being communicated to appellee's building; that the spreading of said fire to and into said building was the natural sequence of setting the same at said time and place; that at said point on said right of way where said fire began the appellant carelessly suffered and permitted such an accumulation of rubbish on its right of way that the escape of fire started therein from said right of way was the ordinary and natural sequence; that all of appellee's officers and representatives were away from said factory when the fire was communicated to it, and had no knowledge or information of the fire until it was too late for them to save any of the property; that some of appellee's officers knew, on said day, and prior thereto, of the existence of said combustible material along said spur and on the right of way; that said fire was started between 9 and 10 o'clock a. m., but the train the engine that set the fire was drawing was unknown.

Appellant insists that the special verdict is not sufficient because there is no finding as to the amount and extent of the grass, weeds, straw, and other combustible material permitted to accumulate and remain on the right of way, nor that permitting said combustible material to remain there for two weeks was unnecessary, or increased the hazards to appellee's property.

This contention of appellant is fully answered by what was said in *Cleveland, etc., R. Co. v. Hadley*, 12 Ind. App. 516, 522, 523. "Counsel insist that the finding that dry grass and other combustible matter were negligently suffered to accumulate on the right of way is the finding of a conclusion and not of a fact, unless it were also shown what was the quantity of such combustible material that was suffered to accumulate. Granting that counsel are correct in this position also, we think the quantity is sufficiently stated. If there was sufficient of such combustible matter to cover

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the ground on the right of way from within eight feet of the north side of the track continuously up to and adjoining the appellee's premises, and if for the length of time stated and in its highly inflammable condition the material was suffered to remain there without any attempt to remove the same, the appellant was guilty of actionable negligence if injury resulted. * * * If the appellant suffered enough of the inflammable material to accumulate to cover the ground for the time, and over that portion of the track and right of way described in the verdict, the presence of the objectionable material in sufficient quantities to cause the fire to spread to appellee's premises is sufficiently established."

It is next insisted by appellant that the facts found do not show that appellant knew of the existence of the fire, and that without such knowledge it could not be guilty of negligence in permitting the fire to escape; that the duty of appellant to use reasonable precaution to prevent the escape of fire does not arise until it has knowledge of the existence thereof. The special verdict shows that appellant had knowledge of the accumulation of the combustible material upon its right of way, adjacent to appellee's factory, and that the weather was very dry for the period of more than two months before said fire, and said combustible matter was highly inflammable, and that the natural sequence of igniting said combustible material was its spread by the burning of said material to appellee's factory, and the destruction thereof by the fire so communicated; and appellant did nothing to prevent the escape of said fire from its right of way or the spread of said fire to said factory. Appellant was required, under such circumstances, conditions, and surroundings of its right of way adjacent to appellee's factory,—environments created by itself,—to prevent the escape of fire from the limits of its right of way. *Indiana, etc., R. Co. v. Overman*, 110 Ind. 538, 541, 542; *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69; *Cleveland, etc., R. Co. v. Hadley*, 12 Ind. App. 516. As was said in *Cleveland, etc., R. Co. v. Hadley, supra*, at p. 523:

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"It was not necessary, to constitute negligence in suffering the fire to spread, that the appellant should have been present at or had notice of the fire, and failed to do anything to put it out. It was bound to know that it was highly probable that fire would occur on its right of way from the escaping sparks of its engines, and it was its duty to use proper care to keep it from spreading beyond the right of way to the adjacent land."

It has been held in many cases in this State that if a railroad company negligently permits grass or other combustible material to accumulate on its right of way, and the same is ignited by fire emitted from its locomotives, and such fire by means of said combustible material escapes to the land of the adjoining proprietor, and burns and consumes his property, without any negligence on his part contributing to the injury, the railroad company is liable for the loss sustained. *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273, 281; *Indiana, etc., R. Co. v. Overman*, 110 Ind. 538, 541, 542; *Chicago, etc., R. Co. v. Williams*, 131 Ind. 30, 33; *Pittsburgh, etc., R. Co. v. Jones*, 86 Ind. 496, 499, 500, 44 Am. Rep. 334; *Chicago, etc., R. Co. v. Bailey*, 19 Ind. App. 163, 166-168; *New York, etc., R. Co. v. Grossman*, 17 Ind. App. 652, 655; *Cleveland, etc., R. Co. v. Hadley*, 12 Ind. App. 516, 523-525, and cases cited; *Terre Haute, etc., R. Co. v. Walsh*, 11 Ind. App. 13, 16; *Chicago, etc., R. Co. v. Ludington*, 10 Ind. App. 636; *Lake Erie, etc., R. Co. v. Clark*, 7 Ind. App. 155; *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69, 71, 72; 13 Am. & Eng. Ency. of Law (2nd ed.), 466-469; 3 Elliott on Railroads, §§1226, 1229.

Appellant insists that, "as no definite place where the fire started is found, the court cannot say that it must have been upon appellant's right of way, and not upon the ground occupied by the spur switch." The facts found clearly show that the fire emitted from appellant's engines ignited the combustible material at a point on its right of way southwest of appellee's factory, and that the fire spread, through the medium of said combustible material, to appellee's factory.

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Appellant contends that the jury having found that appellee's factory was built of wood, and close to appellant's right of way, that it was not in operation, and not watched or guarded, but closed, and that some of the officers of appellee had knowledge on and before the day of the fire of the existence of the combustible material on said right of way, these facts show that appellee was guilty of contributory negligence. The rule is that a person erecting a building on real estate adjoining a railroad track takes upon himself the risk of fire being communicated thereto without the fault of the railroad company. *Indianapolis, etc., R. Co. v. Paramore*, 31 Ind. 143. He is not required to keep his property in such a condition as to guard against the negligence of the company, nor to stand guard over it continually to protect it against such negligence, but he has the right to construct buildings on any part of his property, and enjoy the same, without any regard to the proximity of a railroad; and such use of his property cannot be declared contributory negligence in an action against the railroad company for negligently setting fire to the buildings. *Chicago, etc., R. Co. v. Burger*, 124 Ind. 275; *Pittsburgh, etc., R. Co. v. Jones*, 86 Ind. 496, 44 Am. Rep. 334; *Tien v. Louisville, etc., R. Co.*, 15 Ind. App. 304; *Chicago, etc., R. Co. v. Kern*, 9 Ind. App. 505; *Chicago, etc., R. Co. v. Smith*, 6 Ind. App. 262; *Jacksonville, etc., R. Co. v. Peninsular, etc., Co.*, 27 Fla. 1, 9 South. 661, 17 L. R. A. 33, 52; *Burke v. Louisville, etc., R. Co.*, 7 Heisk (Tenn.), 451; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356; *Philadelphia, etc., R. Co. v. Hendrickson*, 80 Pa. St. 182; *Jefferis v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.), 447; *Cincinnati, etc., R. Co. v. Barker* (Ky.), 21 S. W. 347; 8 Lewis R. & Corp. Cases, note on p. 168; 13 Am. & Eng. Ency. of Law (2nd ed.), 482-487; Shearm. & Redf. on Neg. (5th ed.), §680; 3 Elliott on Railroads, §1238. The officers and representatives of appellee had no knowledge of said fire until too late for them to save any of the property, and although some of

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them knew of the existence of the combustible material on the right of way, yet, under the authorities above cited, they were not required to guard and continually watch the factory, nor to remove the rubbish from appellant's right of way. They had the right to assume that appellant would perform the legal duties resting upon it. *Tien v. Louisville, etc., R. Co.*, 15 Ind. App. 304, and cases last cited. As was said in *Tien v. Louisville, etc., R. Co.*, *supra*: "The landowner is not required to live upon his premises, and keep a vigilant outlook for possible negligence upon the part of others, nor is he required to hire guards for such purposes. He is not bound to anticipate that another will be derelict in his duty toward him. He may rely upon the presumption that such person will conform to the legal duties resting upon him. *Chicago, etc., R. Co. v. Kern*, 9 Ind. App. 505; *Chicago, etc., R. Co. v. Smith*, 6 Ind. App. 262; *Pittsburgh, etc., R. Co. v. Jones*, 86 Ind. 496." It follows therefore that the special verdict is not open to the objection urged by appellant.

Appellant insists that the evidence does not show that the fire started on its right of way from sparks or coals emitted from its passing engines, and that appellant was negligent in permitting the fire to escape from its right of way. Appellee was not required to prove such facts by direct evidence. They may be established by either direct or circumstantial evidence, or by both. *Louisville, etc., R. Co. v. Stevens*, 87 Ind. 198; *Louisville, etc., R. Co. v. Krinning*, 87 Ind. 351; *Louisville, etc., R. Co. v. McCorkle*, 12 Ind. App. 691; *Terre Haute, etc., R. Co. v. Walsh*, 11 Ind. App. 13, 17, 18; *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69, 73; 3 Elliott on Railroads, §1244, on p. 1943. No witness testified that he saw a spark or coal pass from appellant's engine to the combustible rubbish on the right of way, yet the evidence fully justified the inference drawn by the jury that the fire was so started. The evidence, direct and circumstantial, shows that appellant permitted combustible rubbish to accumulate on its

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right of way adjacent to appellee's factory, and remain there for a period of more than two weeks, in the month of August, 1895; that the weather was very dry during that summer, and the rubbish became and was very dry and inflammable, and was exposed to ignition, and in danger of being set on fire by sparks and coals from appellant's engines, which passed that point many times each day; that there was an up-grade near said point for about a mile, and appellant's engines in passing appellee's factory put on steam to increase the speed so as to carry them over the grade, and this caused great quantities of sparks and coals to be emitted from the engines while passing said factory; that the rubbish on appellant's right of way had been frequently ignited by fire from appellant's engines at points within a short distance east of appellee's factory prior to and on the day it was burned; that said combustible rubbish on appellant's right of way was ignited by fire from appellant's engines, and the wind on said day and at said time was blowing from the southwest to the northeast, and therefore spread through the rubbish, in the direction the wind was going, to appellee's factory, and destroyed it; that appellant did nothing to prevent the escape of said fire from its right of way, or the spread thereof to said factory.

The evidence in regard to the accumulation of rubbish, the dry weather, the up-grade, the exertions of the engines in drawing the trains up the same, and the consequent throwing of sparks and coals of fire, the frequent ignition of the combustible material on the right of way by fire emitted from said engines before said fire, and other surroundings and conditions of which appellant was bound to take notice, and of which said evidence proved it had actual notice, was sufficient to authorize the jury to find that the natural and probable consequences thereof were that said combustible material on said right of way would be set on fire by sparks and coals from said engines, and that said fire would spread and escape, through the medium thereof, from said right

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of way to the adjoining land, and destroy the property thereon, and that appellant, in the exercise of ordinary care, should have foreseen such consequences, and made proper provision to prevent the same. If such was the natural and probable consequences of operating appellant's railroad at said point on account of the surroundidngs and conditions, and in the exercise of ordinary care it should have foreseen the same, its failure to prevent the escape of fire from its right of way, and the consequent destruction of appellee's property, was negligence. *Indiana, etc., R. Co. v. Overman*, 110 Ind. 538, 541, 542; *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69; *Cleveland, etc., R. Co. v. Hadley*, 12 Ind. App. 516, 523. The evidence was sufficient to authorize the jury to find facts showing that appellant was guilty of negligence in permitting said combustible rubbish to accumulate and remain upon its right of way adjoining appellee's factory, and that it was guilty of negligence in permitting the fire to escape from its right of way to appellee's factory. 3 Elliott on Railroads, §1226, and authorities next before those last cited. What we have said in regard to the facts found in the special verdict being sufficient to support the judgment rendered thereon, and the authorities there cited, fully uphold the conclusion that the evidence was sufficient to sustain the facts found in the special verdict.

Appellee was permitted to introduce testimony in regard to the fires being set by engines of appellant near the time of the fire in question, and on the right of way near the same place. Appellant insists that this evidence was not proper for any purpose, for the reason that the theory of each paragraph of complaint was, not that the fire was the result of the careless and negligent construction or operation of appellant's engines, but its negligence in allowing the accumulation of combustible rubbish upon its right of way, and permitting the fire communicated thereto by its engines to escape to appellee's premises, and destroy its factory. The theory of the third paragraph of complaint is correctly stated by appellant, and it is unnecessary for us to determine

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whether or not its theory of the first paragraph is correct, for the reason that the special verdict finds no facts concerning any defects in the construction or negligence in the operation or management of appellant's engines. The facts found by the jury, therefore, show that, even if it was error to admit said testimony, said error was harmless. Said evidence was proper, however, for the jury to consider in connection with all the other evidence in the cause, in determining the degree of care required of appellant in keeping its right of way free from combustible material at that point. Railroad companies are required to exercise due care to keep their right of way free from combustible material, and the degree of care to be exercised depends upon the surroundings. It was not only proper, therefore, for appellee to show that appellant had allowed combustible material to accumulate and remain on its right of way, that there was an up-grade on appellant's road near said factory, and the exertions required of engines in drawing trains of cars up and over the same, and that sparks and coals were emitted from the engines approaching and passing appellee's factory, on account of the engines being taxed to their full capacity to pass up said grade, but also that said sparks and coals ignited the combustible material on said right of way. Such evidence not only showed that combustible matter, if allowed to accumulate on appellant's right of way, at or near said factory, was in much greater danger of being set on fire by sparks and coals from engines, on account of the conditions and surroundings, but that the same was actually set on fire by sparks and coals from said engines. Under such circumstances, the degree of care required of appellant would be much greater than under different conditions and surroundings. While appellant was bound to take notice of these conditions, and that combustible rubbish had been set on fire by sparks and coals from its engines, and use proper care in proportion to the danger to prevent the fire from spreading beyond the right of way to the adjacent land, and knowledge thereof will be presumed, yet it was proper to

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prove, as was done by the evidence, that it had actual notice and knowledge thereof. It follows that the evidence was properly admitted.

It is next insisted that the court erred in permitting appellee to prove by a witness, over appellant's objection, that the property destroyed by fire had a special and peculiar value as a manufacturing plant. Said witness was asked by counsel for appellee to "state what, in your judgment, that factory, building, horseshoes, machinery, and material were worth just before the fire,—the manufacturing plant?" This question was objected to by appellant, "for the reason that the property sued for is sued for in separate items, and not as a plant." This objection was overruled, and appellant excepted. The witness answered: "About \$12,000." The question was as to the value of said property destroyed as an entirety, and the court committed no error in permitting the witness to answer the same. Moreover the facts found in the special verdict show that the jury only assessed appellee's damage at the market value of the property destroyed.

It is assigned as one of the causes for a new trial that the court erred in overruling appellant's motion, made after the jury returned into court their special verdict, and before they were discharged, to require the jury to return to their room and make more specific their answers to each of the interrogatories 151, 173, and 177. If such motion was made, it is not shown by any entry copied in the transcript. The only statement in regard to a motion to make the answers to the interrogatories named more specific is contained in the motion for a new trial. Said motion to require the jury to make their answers to said interrogatories more specific, and the ruling of the court thereon, were not made a part of the record by assigning said ruling as a cause for a new trial, but could only be made a part of the record by a bill of exceptions or order of court. No question is presented, therefore, by said cause for a new trial. Finding no available error in the record the judgment is affirmed.

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**GATES v. BALTIMORE AND OHIO SOUTHWESTERN
RAILWAY COMPANY.**

[No. 18,414. Filed March 13, 1900.]

APPEAL AND ERROR.—Briefs.—Failure to Argue Errors Assigned.—Waiver.—Reply Brief.—The failure of appellant to argue in his original brief errors assigned on appeal will be deemed such a waiver of the errors as to preclude him from demanding that his argument made in a reply brief, filed more than sixty days after the submission of the cause, be considered. *Spencer v. Spencer*, 136 Ind. 414, disapproved. *pp.* 339-342.

SAME.—New Trial.—Motions.—No question is presented on appeal by an assignment in a motion for a new trial "that the judgment of the court is contrary to law, and is not sustained by the evidence" and "that the decision of the court is not sustained by sufficient evidence, and is contrary to law," where the cause was tried by a jury, and a special verdict returned. *pp.* 342, 343.

From the Jackson Circuit Court. *Affirmed.*

A. N. Munden, B. H. Burrell, F. Branaman, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellant.

E. W. Strong, O. H. Montgomery, H. D. McMullen and H. R. McMullen, for appellee.

JORDAN, J.—Appellant was in the employ of the Baltimore & Ohio Southwestern Railway Company as a conductor upon one of its freight trains. By reason of an injury received, which he attributes to the negligence of said company, he instituted this action to recover damages.

It is alleged substantially in the complaint that the defendant negligently permitted and suffered a certain metal rod, placed near the coupling of a freight car, which was handled by appellant in the line of his duty, to project out to such a distance that, when the car was coupled to another car, the rod came into contact with timbers of the adjacent car, and thereby rendered the coupling or uncoupling of the cars dangerous. It is, in effect, alleged that, under these circumstances, appellant, while attempting to uncouple such car

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from another car, without notice that it was dangerous or unsafe to do so, was injured by having his right arm caught between the rod and the other car, and that the injury was of such character as to render amputation of the limb necessary, etc. Absence of contributory negligence upon the part of the appellant is also alleged.

Upon the trial the jury returned a special verdict framed by means of interrogatories, under the act of 1895, and awarded appellant damages in the sum of \$10,000. Appellant and appellee both moved for judgment on this verdict. The motion of the former was overruled and that of the latter was sustained.

Appellant, before the rendition of the judgment, also moved for a new trial, assigning as reasons therefor, among others: (1) "That the judgment of the court is contrary to law, and is not sustained by the evidence; (2) That the decision of the court is not sustained by sufficient evidence, and is contrary to law." This motion was overruled, and judgment was rendered upon the special verdict that appellant take nothing by his action, and that appellee recover its cost. From this judgment appellant appeals, and assigns as errors: (1) That the court erred in sustaining appellee's motion for judgment on the special verdict; (2) in overruling appellant's motion for judgment on the special verdict; (3) in overruling the motion for a new trial. On October 8, 1897, a transcript of the record was filed in the office of the clerk of this court, together with appellant's original brief. On March 10, 1898, appellee filed its brief. On May 13th following, appellant filed what is denominated a reply brief. Appellant prefaces his original brief by giving a mere summary of the facts in respect to the injury sustained, and citing us to various pages and lines of the transcript, which are said to disclose the proceedings had in the lower court. Following this, there is presented what is denominated a general statement of the special verdict. Next follows what appellant is satisfied to submit as his sole argument to con-

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vince us that the first and second assignments of errors ought to be sustained. These alleged errors are discussed as follows: "The court erred in overruling appellant's motion for a judgment in his favor upon the special verdict. The court erred in sustaining appellee's motion for a judgment in its favor. This verdict was prepared and rendered under the special verdict law of 1895, which was repealed by the act of 1897. In order to fully comprehend the ruling of the court upon each of the above assignments of error, it will require an examination of the special verdict in this cause." These alleged errors are then dismissed, and are not again referred to in the brief until near its close, where it is merely asserted that, under the evidence and the law, the special verdict is such as to warrant a judgment for \$10,000 in appellant's favor, and that the court erred in overruling his motion for judgment thereon. This may be said to constitute the entire argument in the original brief in respect to the questions sought to be raised under the first and second assignments of error.

It is a well settled rule of appellate procedure that a party, in order to have alleged errors of the trial court considered upon appeal, must do more than merely call attention to them, and assert that the court erred. He is required to go further, and, at least, make an attempt to argue or show wherein he claims that the rulings of the court are erroneous; otherwise, the errors alleged, in respect thereto, will be considered as waived. *Chicago, etc., R. Co. v. Hunter*, 128 Ind. 213; *Ewhank's Manual*, §§180, 188; *Elliott's App. Proc.* §§440, 445.

It is evident that appellant, in his original brief, has failed to comply with the rule so firmly settled by the authorities, and has left this court unaided to discover, if possible, wherein the ruling of the court which he calls in question, under the first or second assignment of error is wrong.

It is true that six months and over after the submission of this cause appellant, by his attorneys, Elliott & Elliott, who

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apparently came into the case after the filing of the original brief, filed what we previously said was denominated "a reply brief". While this latter document professes to be a reply to the brief of appellee, it is in fact, however, intended thereby to perform or discharge the duty which appellant omitted in his original brief; and in this brief, for the first time, an argument is advanced and authorities cited to show that the court erred in awarding judgment upon the special verdict in favor of appellee.

Appellant was, under the rule, required to file his first or original brief within sixty days after the submission of the cause and, as previously stated, it was not sufficient for him merely to assert therein, in general averments, that the ruling of the trial court was wrong, without making any effort to prove this bare assertion. Such assertions, in the absence of some argument or discussion in respect to the infirmity of the ruling of the trial court, are worthless. *Liggett v. Firestone*, 102 Ind. 514; *Acra v. Cornforth*, 4 Ind. App. 496. His failure to discharge the duty required of him in the first instance until long after the filing of appellee's brief, wherein the infirmity of the original brief in this respect was urged, may well be deemed such a waiver of the errors in question as will serve to preclude him from demanding that his argument in relation thereto, in his reply brief, be considered.

It is true that it is broadly stated or asserted in *Spencer v. Spencer*, 136 Ind. 414, that this court "can not decline to consider a question fairly presented by the record and argued by the appellant, when an opportunity has been given to the appellee to be fully heard upon such question." The holding that the court can not decline to consider a question, as asserted in *Spencer v. Spencer*, *supra*, under the circumstances as therein mentioned, is certainly too broad, and is therefore disapproved. The rule which affirms that alleged errors not argued by appellant in his original brief shall be deemed waived is reasonable and necessary in order that the

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court and counsel for appellee may be seasonably informed of the questions to be considered and decided, and also in order that the business of the court may not be impeded or interrupted by a continued exchange of arguments upon the part of the respective counsel. Ewbank's Manual, §191. It follows that appellant, having waived all questions arising out of his first and second assignments of error, and also questions relative to the alleged error of the court in admitting certain evidence, by reason of his failure to argue or discuss them in his original brief, can not demand that these alleged errors be considered under the argument presented in his reply brief, and, in obedience to the well settled rule mentioned, they are dismissed without consideration.

It is, to a limited extent, argued in appellant's original brief and in his reply brief that the special verdict is contrary to law, and not sustained by the evidence, and for these reasons it is claimed that a new trial ought to have been granted. We can not consider these questions, because appellant did not conform to the provisions of the code in assigning them in his motion for a new trial. By §568 Burns 1894, §559 R. S. 1881 and Horner 1897, it is provided that, "A new trial may be granted in the following cases: * * * *Sixth*. That the verdict or decision is not sustained by sufficient evidence, or is contrary to law."

It was assigned, as we previously stated, in the motion for a new trial, that the judgment of the court was contrary to law and not sustained by the evidence, and that the decision of the court was not sustained by sufficient evidence, and was contrary to law. This case was tried by a jury, and a special verdict returned. It is evident, then, that neither of the above mentioned reasons is, under the circumstances, authorized by the statute. The word "decision", as employed by the section of the code above cited, means the finding of the court upon the facts where the cause is tried by the court, and has no application where the trial is by jury. *Wilson v. Vance*, 55 Ind. 394; *Christy v. Smith*, 80 Ind. 578.

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That the judgment is not sustained by the evidence or is contrary to law is not recognized by the code as a cause for a new trial. *Rosenzweig v. Frazer*, 82 Ind. 342; *Rodefer v. Fletcher*, 89 Ind. 563; *Hubbs v. State*, 20 Ind. App. 181. It follows that the judgment must be and is affirmed.

BLUME v. THE STATE.

[No. 19,027. Filed March 14, 1900.]

CRIMINAL LAW.—Indictment.—Indorsement.—It is immaterial on what part of an indictment the indorsement and grand jury foreman's signature appears. *pp. 345, 346.*

SAME.—Defense of Insanity.—Question of Fact.—The fact of sanity, when properly put in issue in the trial of a criminal cause, like any other material fact in the case, is considered by the jury, and found by the verdict, and such result, when fairly arrived at, will not be disturbed on appeal. *p. 346.*

SAME.—Murder.—Evidence.—Sufficiency.—In a trial under an indictment for murder in the first degree the evidence showed that defendant, a young man of dissolute habits, had become attached to an inmate of a house of prostitution. A loathsome disease rendered defendant a cripple, and the refusal of the woman to cohabit with him while in this condition excited his resentment and jealousy; and armed with a revolver, he went to the brothel where she resided, and after a short and apparently friendly interview, he shot and killed her, and then fired two balls into his own body. While the woman lay dying he asked if she was dead, and said "I have fixed her." A short time before the homicide, in a conversation with a friend, he declared that he would "fix her." *Held*, that the evidence was sufficient to warrant a conviction for murder in the first degree. *pp. 346, 347.*

SAME.—Defense of Insanity.—Opinion Evidence.—The testimony of a witness upon the issue of the sanity of the defendant in the trial of a criminal action was properly admitted in evidence, where the witness gave the facts and circumstances upon which his opinion was founded, as the weight to be given the testimony was a question for the jury, and depended upon the facts narrated as the basis of the opinion. *p. 347.*

SAME.—Murder.—Defense of Insanity.—Evidence.—Letters Written by Defendant.—Expert Testimony.—Where in a prosecution for murder the sanity of defendant was in issue, letters written by defendant to the deceased shortly before the homicide were properly

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161	290
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163	624
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165	185
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166	31
167	120
167	234
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169	563
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171	452

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admitted in evidence for the purpose of obtaining the opinion of an expert witness upon the question of the sanity of defendant. pp. 348, 349.

CRIMINAL LAW.—Instructions.—Defense of Insanity.—Harmless Error.—An instruction in a prosecution for murder that a man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions, and if he yields to wicked passions, and purposely and maliciously slays another, he cannot escape the penalty on the ground of mental incapacity was harmless even though the evidence showed that defendant was of unsound mind. pp. 349, 350.

SAME.—Instructions.—Defense of Insanity.—Reasonable Doubt.—An instruction on the question of sanity in a prosecution for murder that where insanity has once been shown to exist, it will be presumed to have continued until the contrary has been shown by the evidence is not bad for failure of the court to add the words "beyond a reasonable doubt" where the jury were repeatedly told in other instructions that they could not convict defendant unless his guilt was established beyond a reasonable doubt. pp. 350, 351.

SAME.—Instructions.—Defense of Insanity.—Where in a prosecution for murder the question of the sanity of defendant was in issue, defendant was not entitled to an instruction as to the presumption that insanity once shown to exist is presumed to continue, in the absence of proof that defendant at any time had been insane, and he could not be injured by an instruction, even if imperfect or incomplete, applicable only to a state of facts which was not shown by the proof. pp. 351, 352.

SAME.—Instructions.—Murder.—Absence of Motive as Evidence of Insanity.—Where in a prosecution for murder the evidence showed that the relations between defendant and deceased were immoral and illicit and her character and mode of life kept him unhappy and jealous, and the repugnance for him manifested by the woman in the latter part of their acquaintance, on account of his diseased condition, inflamed his resentment against her, an instruction that absence of motive might be considered as a circumstance indicating insanity was properly refused. pp. 352, 353.

APPEAL AND ERROR.—Denial of Request Made by Attorney During Adjournment of Court.—The denial of a request made by the attorneys for defendant, during the adjournment of court, and in the absence of the attorneys for the State, to send the jury out of hearing while they submitted a motion founded upon the alleged misconduct of one of the attorneys for the State during the argument, constitutes no part of the proceedings in the cause and is not subject to review on appeal. pp. 353, 354.

MISCONDUCT OF COUNSEL.—New Trial.—Defendant was not entitled to a new trial on account of the misconduct of the prosecuting

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attorney in referring in his argument to the failure of the defendant to testify, where the court sustained defendant's objection to the statement, and instructed the jury that the remark was improper, and that the failure of defendant to testify should not be considered by them, and the defendant proceeded with the trial without any motion to set aside the submission and discharge the jury. *pp. 354-357.*

From the Boone Circuit Court. *Affirmed.*

Sherman Mott, J. F. McCray and S. M. Ralston, for appellant.

F. C. Groninger, A. J. Shelby, W. L. Taylor, Attorney-General, Merrill Moores, C. C. Hadley and J. B. Shelby, for State.

DOWLING, J.—Indictment for murder in the first degree. On application of appellant, the venue was changed, and the cause was sent to Boone county. Plea of not guilty, together with a special plea of insanity. Trial, and verdict of guilty of murder in the first degree, and that defendant be imprisoned in the State prison during life. Judgment on verdict. Motions to quash the indictment, and for a new trial, were made and overruled. The decisions on these motions are assigned for error.

(1) It is first objected that the indictment was not properly indorsed, but we are unable to discover the supposed defect. The record entry, immediately following the indictment gives the title of the cause, and the name of the crime charged. The words, "A true bill, Albert Sahm, Foreman," next appear below the title and the name of the offense, and opposite these is written, "Endorsement of Indictment." The requirement of the statute concerning the indorsement seems to have been strictly complied with. The ground of the objection is that it does not appear that the words, "A true bill, Albert Sahm, Foreman," were written upon the back of the indictment. With this view, we are unable to agree. But, even if these words were written elsewhere than on the back of the bill, the indictment would

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probably be good. There is excellent authority for the proposition that it is immaterial on what part of the bill the foreman's signature appears. 1 Bishop's Crim. Proc. (3rd ed.), §698; *State v. Bowman*, 103 Ind. 69.

(2) Counsel for appellant contend, in the second place, that the verdict, at least upon the issue as to the insanity of the defendant at the time of the homicide, is not sustained by sufficient evidence. It cannot be asserted that there was no evidence of appellant's entire sanity when the offense was committed. On the contrary, the testimony on that subject was so strong and conclusive that the jury were fully authorized to accept and act upon it. But whether the proof on this branch of the case was evident and convincing, or otherwise, the jury were the exclusive judges of its weight and credibility, and the court cannot interfere with the conclusion reached by them. The fact of sanity, when properly put in issue, like every other material fact in the case, is considered by the jury, and found by the verdict, and by the result, when fairly arrived at, we are bound.

(3) It is next urged that the verdict is contrary to law, in that the evidence, at most, will sustain a conviction for manslaughter only. The facts, in brief, were as follows: The appellant, a young man of dissolute habits, became attached to Grace Harvey, an inmate of a house of prostitution in the city of Indianapolis. A loathsome disease rendered the appellant a cripple, and the refusal of the woman to cohabit with him while in this condition excited his resentment and jealousy. A short time before the homicide, in a conversation with a friend, he declared that he would "fix her". Armed with a thirty-two caliber revolver, he went to the brothel where she resided, and, after a short and seemingly friendly interview, at the foot of the stairway, down which she had accompanied him, he shot and killed her, and then fired two balls into his own body. While the woman lay dying, he asked if she was dead, and said, "I have fixed her". The assassination of the unhappy woman

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was cruel, malicious, unprovoked, and premeditated. Not one mitigating circumstance appears in the case. There is nothing in the proof to reduce the offense of the appellant below murder in the first degree.

(4) The fourth point made is that the testimony of the witness, Davidson, was improvidently admitted on behalf of the State, on the issue of the sanity of the appellant. Counsel say that this person had not such opportunities for observing the appellant as were necessary to qualify him to give an opinion upon the subject of his mental condition. The weight to be given to the testimony of the witness was a question for the jury, and depended upon the facts related by the witness as the basis of his opinion. Davidson stated when and where he had seen the appellant, and what was said and done by him. He was present when appellant testified as a witness in a suit for damages prosecuted by him against the Western Union Telegraph Company, and took notes of his evidence. As this witness gave the facts and circumstances upon which his opinion was founded, we think the testimony was competent. *Goodwin v. State*, 96 Ind. 550, and cases cited; *Grubb v. State*, 117 Ind. 277; *Johnson v. Culver*, 116 Ind. 278.

(5) The next point made in the briefs for appellant is that the court erred in permitting one Perry Kennedy, a detective, to testify, on behalf of the State, in rebuttal, that he had once arrested Dr. William H. Kluge, a witness for appellant, and that he had seen Kluge's picture in the Rogue's Gallery, at Indianapolis. An examination of the record discloses that, when the witness testified that he had arrested Kluge, this statement was stricken out on motion of the appellant; and that the court sustained appellant's objection to the question whether the witness had seen Kluge's picture in the Rogue's Gallery. Having secured a ruling in his favor upon each of these points, the appellant had no reason to complain of the action of the court, and no question upon this evidence is presented by the record.

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(6) The sixth and seventh reasons assigned for a new trial are the rulings of the court upon objections to the admission in evidence of certain letters written by the appellant to the deceased. The letters, some twelve in number, were introduced for the purpose of obtaining the opinion of an expert witness, Dr. Frank B. Wynn; upon the question as to the sanity of the appellant at the time of the homicide, and shortly before that occurrence. The first of these letters is dated August 4, 1897, and the last, June 27, 1898, and they cover at least a portion of the period during which it was claimed that the appellant was of unsound mind. The letters were read in evidence, over the objection of the appellant, and were submitted to the examination of the expert witness. After such examination, and, upon the basis of the same, the witness was permitted to give his opinion as to the sanity of the writer. We find no error in the action of the court. Written communications, as well as oral conversations, may afford evidence of the soundness or unsoundness of the mind of the writer, and may constitute a sufficient basis for the opinion of a skilled physician or alienist upon that subject. Indeed, evidence of this character is regarded as of especial value in many cases, and as furnishing important tests of insanity. The following, from a standard work upon medical jurisprudence, is directly in point: "The value of letters or other writings, as tests of insanity, has been shown by abundant illustrations by Marce, in a monograph on this particular topic. To these might be added a series of cases, English and American, in which the insanity of testators and obligors has been in a large degree determined by the characters of written documents emanating from them. Nor is such evidence without its worth in criminal prosecutions, especially where the question is whether insanity is genuine or simulated. It is not merely the contents of writings that contribute to the decision of the question. The style and handwriting often supply important tests. 'What experienced forensic physician,' asks

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Liman, 'is not familiar with the writings of certain classes of lunatics, namely, the so-called querulants, writings teeming with flourishes—words and sentences italicized singly, doubly, or trebly—with parentheses, interlineations, notes of quotation—writings often very voluminous, swollen with citations of alleged laws?' In other cases of lunacy are noticed peculiar modes of construction, words and expressions both original and incomprehensible, such as are familiar to every psychological physician. The first stages of paralysis are characterized by flightiness of writing, omission of words and sentences, blots, etc." 1 Wharton & Stille's Med. Juris., §387.

The witness, who showed himself thoroughly competent, described in a very intelligent manner the characteristics of the written compositions of the insane. He called attention to the absence of these peculiarities in the letters written by the appellant. Upon the basis of the coherency and consistency of these letters, the omission of everything fantastic or absurd, their apparent adherence to the facts of the situation of the writer, the quality and regularity of the handwriting, and other features pointed out by the witness, he expressed the opinion that, at the time they were written, the appellant was of sound mind. That this evidence was competent, we entertain no doubt. The foundation on which the opinion rested was fully made known to the jury, and they had the means of estimating its weight and value.

The objection that there were other letters in the possession of the State, written by appellant, and that all should be read, or none, was not deserving of serious consideration. The State had the right to introduce such of the letters as it deemed necessary, and to withhold all others in its possession.

(7) The giving of instructions numbered twenty-two and twenty-four, and the refusal of the court to give instructions numbered twenty, thirty-six, thirty-eight and thirty-nine are next complained of.

Instruction number twenty-two was in these words: "A

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man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions. If he yields to wicked passions, and purposely and maliciously slays another, he cannot escape the penalty prescribed by law upon the ground of mental incapacity. That state of mind caused by wicked and ungovernable passions, resulting not from mental lesion, but solely from evil passions, constitutes that mental condition which the law abhors, and to which the term *malice* is applied."

The objection taken to the foregoing instruction is that "the evidence in this cause clearly showed appellant to have been a man of unsound mind, and under that condition there could not be a conscious violation of law." If "the evidence clearly showed that the appellant was a person of unsound mind," then the instruction could do him no harm. It was expressly confined to "a man of ordinary will power, unimpaired by disease." The attempted definition of malice was neither clear nor accurate, but the obscurity of the language used by the court was not calculated to injure the appellant.

By the twenty-fourth instruction, the jury were told that "a reasonable doubt as to the sanity of the defendant may arise upon the evidence of the State, whether the defendant introduce any evidence on the subject or not, and wherever insanity has once been shown to exist, it will be presumed to have continued until the contrary has been shown by the evidence." The correctness of this instruction is questioned because it failed to state that, where insanity has once been shown to exist, it will be presumed to have continued until the contrary has been shown by the evidence *beyond a reasonable doubt*.

The jury were repeatedly told in other general instructions given by the court that they could not convict the defendant unless his guilt was established beyond a reasonable doubt. They were further instructed that if, after duly considering all the evidence in the cause, there existed in the minds of the jury a reasonable doubt of the sanity of the

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accused at the time of the commission of the crime alleged, they should acquit him. In view of the full and careful instructions upon the issue of insanity, and the proof concerning the same, we cannot believe that the failure of the court to repeat the words, "beyond a reasonable doubt", in the twenty-fourth instruction, operated to the prejudice of the appellant. *Hauk v. State*, 148 Ind. 238; *Goodwin v. State*, 96 Ind. 550. But upon another ground the instruction, even if it had been erroneous, was harmless. There was no proof in the case that the appellant at any time had been insane. Consequently, he was not entitled to an instruction as to the presumption that insanity, once shown to exist, is presumed to continue, and he could not be injured by an instruction, even if imperfect or incomplete, applicable only to a state of facts which was not established by the proof.

It is also contended that the court should have given instructions numbered twenty, thirty-six, thirty-eight and thirty-nine, as requested by appellant. The substance of instructions numbered twenty and thirty-six was contained in other instructions given by the court. Instruction number thirty-eight was an unnecessary refinement upon the direction, repeated again and again in the charge, that, before the jury could convict, they must be satisfied of the guilt of the defendant beyond a reasonable doubt, and that, unless every material fact alleged in the indictment and necessary to constitute his guilt of the crime charged was established beyond a reasonable doubt, they must acquit him.

The court refused to give the thirty-ninth instruction asked for by appellant, which was as follows: "It is a rule, universally observed, that men in the business, social, and ordinary affairs of life, as well as in the commission of crime, act from motive. It is proper, therefore, for you, as bearing upon the soundness or unsoundness of defendant's mind at the time of the commission of the alleged crime, to consider what reason, if any, the defendant had for committing the crime charged against him in this cause. This is true for

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the reason that if, after you have examined and weighed all the evidence in the cause, you believe that the defendant had no motive for the commission of the alleged crime, and in that event it is for you to say whether the absence of a motive to commit the crime is not a persuasive circumstance in favor of the defendant's plea of unsoundness of mind."

The instruction tendered was objectionable upon many grounds, and the court properly refused to give it. Whether men in the commission of crime universally act from motive was a question the court had no right to determine as a matter of law. That men always act from motive in the commission of crime is not universally admitted.

It is observed by Blackford, J., in *Sumner v. State*, 5 Blackf. 579, 36 Am. Dec. 561, that "It is easy to conceive that the evidence in the case now before us might not be sufficient to produce on the minds of the jury an absolute certainty of the defendant's guilt, nor to prove that he had any motive to commit the crime charged, and yet it might be strong enough to satisfy the jury beyond a reasonable doubt that he was guilty." It is said that there may be crimes without motive. Wharton & Stille's Med. Juris. §405; Wharton Crim. Ev., §784. It is certainly true that in numerous cases the motive for the crime is not apparent. But the instruction, as tendered, was self-contradictory and meaningless. It asserted, without qualification or exception, that all men, sane and insane, acted from motive; and that if the jury found that the defendant had no motive for the commission of the alleged crime, they might consider such absence of motive as a persuasive circumstance in support of his plea of insanity. A court cannot be required to adopt as its own, and become responsible for, inconsistent and unintelligible statements of the law. Besides, the instruction was not pertinent to the facts proved, and for that reason the appellant was not entitled to it.

The evidence left no room for doubt as to existence and precise nature of the motives by which the appellant was

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actuated. Not a circumstance in the proof gave color to the theory that the homicide was the result of a delusion, or an insane impulse. The situation was utterly unlike that of a kind husband, of moral habits, living in proper relations of mutual confidence and affection with a pure and virtuous wife, who suddenly slays her without apparent cause, and then makes a desperate attempt upon his own life. On the contrary, the relations between the appellant and his paramour and victim were immoral and illicit. Her character and mode of life kept him unhappy and jealous. His own diseased condition soured and embittered him, and the repugnance for him manifested by the woman in the latter part of their acquaintance inflamed his resentment against her. When he found that he could no longer enjoy the favor of his mistress, he determined to destroy her life, and to put an end to his own. In executing this purpose, he exhibited a reckless disregard of consequences by no means uncommon in persons in his situation. His evil habits, vile associations, and depraved course of conduct tended directly toward a catastrophe of crime. The motives for that crime, apparent in every feature of the case, were jealousy, disappointment, and mortification. In this state of the evidence, an instruction that absence of motive might be considered as a circumstance indicating insanity was wholly out of place, and could have had no other effect than to bewilder the minds of the jury. Where there is any evidence of the existence of a material fact, a party is not entitled to an instruction as to the effect of a total failure of proof of such fact.

After an adjournment of the court at noon, and while it was not in session, in the absence of the counsel for the State, the attorneys for appellant privately asked the judge of the court to send the jury out of hearing while they submitted a motion founded upon the alleged misconduct of one of the attorneys for the State during the argument. This, the judge, in the same private conversation, said he would do. The denial of the request so made is one of the rea-

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sons assigned for a new trial, and it is now urged as a ground of reversal of the judgment. This action, on the part of counsel for appellant, was unprecedented, and a matter privately discussed and determined during an adjournment of the court constitutes no part of the proceedings in the cause, and is not subject to review by this court.

The last point made for appellant is that a new trial should have been granted on account of the misconduct of one of the attorneys for the State in referring in the closing argument to the failure of the defendant to testify. It is extremely doubtful whether this question is properly presented by the record. The objection is stated in the motion for a new trial as misconduct of the prosecutor, and as error of law occurring at the trial. But misconduct of the prevailing party is not a ground for a new trial in a criminal cause; and error of law occurring at the trial can hardly be said to have taken place, where an objection was sustained and a decision made in favor of the appellant. The objectionable words were the following: "The defendant in this cause has not gone upon the stand to testify because * * *." The appellant by his counsel objected to the statement at the time it was made, and his objection was sustained. The judge stopped the attorney for the State, and immediately instructed the jury in these words: "It is wholly improper for any remark to be made concerning the defendant's failure to testify, and it is wholly improper, gentlemen, for you to consider that fact when you retire to your jury room. It is wholly improper for you to refer to the fact in the jury room that he did not testify. He has the right, under the law, not to testify, and he has availed himself of that right, and the jury cannot draw any inference from it, and consider it in any respect against him, and you cannot refer to it in your jury room." To this instruction, the appellant excepted. Nothing more was done by appellant concerning the supposed misconduct of the prosecutor while the court remained in session, except that it was assigned as one of the

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reasons for a new trial. Counsel for appellant now insist with great force and earnestness that for this violation of the rule of the statute the judgment should be reversed. The section of the statute prohibiting any reference to the failure of the defendant to testify in a criminal case is as follows: "The following persons are competent as witnesses: * * *

Fourth. The defendant to testify in his own behalf. But if the defendant do not testify, his failure to do so shall not be commented upon, or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the court to instruct the jury as to their duty under the provisions of this section." §1867 Burns 1894.

In some of the earlier cases, decided soon after the enactment of the provisions above set out, it was held that any reference in the argument by counsel for the State to the fact of the failure of the defendant to testify was cause for a new trial. *Long v. State*, 56 Ind. 182, 26 Am. Rep. 19; *Showalter v. State*, 84 Ind. 562. Other decisions indicate a disposition on the part of this court to adopt a less stringent rule, and to determine questions arising under this section of the statute more nearly in accordance with the principles by which it is guided in analogous cases under the criminal code. In *Coleman v. State*, 111 Ind. 563, the court held that in the absence of a motion by the defendant to set aside the submission, and discharge the jury, there was no available error in refusing the motion on account of the alleged misconduct of the prosecuting attorney in his opening statement. And, in *Robb v. State*, 144 Ind. 569, this language was used: "In the present case it was the privilege of the appellant to have invited and insisted upon some action of the trial court, with reference to the alleged misconduct, and to have based his exception upon the court's ruling. Without doing so he occupies the position of the complaining party in the case from which we have first quoted, namely, of taking an exception to the conduct of the attorney and not to any ruling of the court."

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In the case before us, the objection of the appellant to the offensive remark of the attorney for the State was sustained as soon as made, and the court instantly charged the jury, in clear terms, as to the impropriety of the remark, and their duty to discharge from their minds all consideration of the fact that the defendant had failed to testify. Having had this ruling in his favor, the appellant, without further objection, and without any motion to set aside the submission and discharge the jury, proceeded with the trial. As he adopted this course, and took his chances for an acquittal, he must be held to have waived the right, even if such right existed, to withdraw the case from the jury. But we are inclined to think that misconduct of the character alleged on the part of the attorney for the State does not in every instance constitute such incurable error as, *ipso facto*, entitles a defendant to a new trial, even where the question is properly reserved and presented. It must be presumed that the jury are men of sense, and that they will obey the admonition of the court when told that they must not permit the reference to the failure of the defendant to testify, to influence their minds. In most other instances, when the objection to incompetent testimony, the use of improper language, or other misconduct on the part of counsel, is sustained, and the jury are promptly and sufficiently advised upon the question so presented, it is held that the party injured has obtained all the relief which he can justly claim. While a violation of the statute forbidding comment upon, or reference to the failure of a defendant in a criminal cause to testify, is inexcusable on the part of the offending attorney, and deserving of the severest censure of the court, we do not think that it should, in all cases, have the extreme effect of arresting the cause, and compelling the court to grant a new trial, where reasonable and prompt measures are taken by the court to prevent any injurious effect from such unprofessional and indefensible conduct. *Pigg v. State*, 145 Ind. 560; *Lewis v. State*, 137 Ind. 344; *Livingston v. State*, 141

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Ind. 131; *Lingquist v. State*, 153 Ind. 542, and cases cited. Gross violations of the rule, or a refusal or failure on the part of the offending counsel to heed the admonition of the court when told to refrain from such comment or reference, would, doubtless, justify the court in sustaining a motion to set aside the submission, and order a new trial. We hold, therefore, that the proceedings of the court upon the objection to the improper language used by the attorney for the State were correct, and that the appellant was not entitled to a new trial on account of such misconduct.

Upon a careful and thorough examination of all the evidence in this case, we are convinced that the appellant was properly convicted, and that there is no error in the record. Judgment affirmed.

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[No. 18,665. Filed March 15, 1900.]

HUSBAND AND WIFE.—*Principal and Surety.—Mortgages.—Foreclosure.—Defense.*—In action on a note executed by the wife alone, and secured by a mortgage upon her separate real estate, the burden is upon defendant to allege and prove that she was surety and not principal. *pp. 359, 360.*

SAME.—*Principal and Surety.—Mortgages.—Foreclosure.—Answer.*—An answer in an action to foreclose a mortgage, alleging defendant's ownership of the mortgaged real estate, her coverture, that the note was given for the debt of her husband, that she signed it as surety and received no part of the consideration, and that it did not inure to her benefit or to the benefit of her estate was sufficient within the meaning of §6964 Burns 1894 to avoid the complaint. *p. 360.*

APPEAL AND ERROR.—*Practice.—Sustaining Demurrer to Good Paragraph of Pleading.—Harmless Error.*—It is harmless error to sustain a demurrer to one paragraph of a pleading where a remaining paragraph contains all the material allegations thereof and no more; but the error is not harmless if the paragraph allowed to stand imposes the burden of adducing more or different evidence than would have been necessary under the paragraph erroneously condemned. *Kniss v. Holbrook*, 16 Ind. App. 229, disapproved. *pp. 361, 362.*

From the Washington Circuit Court. *Reversed.*

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P. McCart, W. H. Talbot, J. A. Zaring, M. B. Hottel, J. Giles, F. E. Gavin, T. P. Davis and J. L. Gavin, for appellant.

Thomas B. Buskirk, William Farrell, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellee.

MONKS, J.—Appellee sued upon a note executed by appellant February 14, 1891, and to foreclose a mortgage securing the same executed by appellant and her husband. The complaint was in two paragraphs against appellant; her husband having deceased before the commencement of the action. An answer in five paragraphs was filed, the first being a general denial. Appellee's demurrer for want of facts to each paragraph of said answer except the first was sustained as to the second, and third, and overruled as to the fourth, and fifth. A reply was filed, and the case, being at issue, was tried by the court, and a finding made in favor of appellee; and, over a motion by appellant for a new trial, judgment was rendered in favor of appellee against appellant on said note and a decree of foreclosure on said mortgage. The errors assigned, and not waived, call in question the action of the court in sustaining appellee's demurrer to the third paragraph of answer, and in overruling appellant's motion for a new trial.

It is alleged in the first paragraph of complaint, in substance, that appellant on February 14, 1891, by her note of that date, which is filed with and made a part hereof, and marked Exhibit A, promised to pay appellee \$3,000, with interest at six per cent. per annum from date; that said note is now due and wholly unpaid; that at the same time appellant and her husband, Joseph J. Field (then in full life, but now deceased), executed to appellee a mortgage, a copy of which is filed with and made a part hereof, and marked Exhibit B, to secure the payment of said note upon the following real estate (describing it). Prayer for judgment and decree of foreclosure. The same facts are alleged in

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the second paragraph, and it is also averred that "the said plaintiff, at the special instance and request of said defendant, loaned her the sum of \$3,000; that prior to making said loan to said defendant she informed him (said plaintiff) that she wanted to borrow said sum of \$3,000 for her own use and benefit; that he on said day paid over to said defendant, in her own proper person, said sum of \$3,000." It was also averred in said paragraph that the real estate described in the mortgage was the separate property of appellant.

It was alleged in the third paragraph of answer that "the said defendant at the time the note and mortgage sued on were executed was the owner in fee simple of the real estate described in said mortgage; that at the time said note and mortgage were executed she was a married woman, the wife of Joseph J. Field; that the note was given for the debt of her said husband; and she says she signed the same as his surety, receiving no part of the consideration for the same, and that she executed said mortgage solely to secure his said debt; that she did not receive any consideration for said note and mortgage, nor did the same inure to the benefit of herself or her estate."

In an action on a note and mortgage executed by a man and his wife, the rule in this State is that, if it appears from the allegations in the complaint that the mortgage is upon the separate real estate of the wife, it must also be shown by proper allegations that the contract was one the wife had power to make; in other words, that she was principal, and not surety, or the complaint will not be sufficient to withstand a separate demurrer of the wife for want of facts. The burden of proving such facts is upon the plaintiff in such case. *Crisman v. Leonard*, 126 Ind. 202, 203, and cases cited; *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213, 217-223. But when the complaint is upon a note executed by the wife alone, and secured by a mortgage upon her separate real estate, there is no presumption that she is surety, and the burden is upon her to allege and prove that

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she executed the note and mortgage as surety, and not as principal, and the complaint in such case is sufficient, although no special facts showing that she was principal, and not surety, are alleged. *Crisman v. Leonard*, *supra*, and cases cited; *Miller v. Shields*, 124 Ind. 166. As the note sued upon was executed by appellant alone, it is clear, under the rule stated, that as to each paragraph of the complaint the burden was upon her to aver and prove that she was surety and not principal.

The allegations in the second paragraph that appellant solicited the loan and represented that it was for her own use and benefit, and that appellant paid the same over to her, may be true, and appellant's contract be one of suretyship only. It is settled in this State that whether or not a married woman is surety will be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from an inquiry as to whether or not the wife received, in person or estate, the benefit of the consideration upon which the contract rests. *Vogel v. Leichner*, 102 Ind. 55, 60; *Nixon v. Whitely, etc., Co.*, 120 Ind. 360, 362, and cases cited; *Crisman v. Leonard* 126 Ind. 202, 203; *Lackey v. Boruff*, 152 Ind. 371, 376, and cases cited.

The third paragraph of answer to the complaint avers appellant's ownership of the mortgaged real estate, her coverture, that the note was given for the debt of her husband, that she signed it as surety, and received no part of the consideration, and that it did not inure to her benefit or the benefit of her estate. Her suretyship is averred in express terms, and the particular facts are set forth which exhibit such suretyship. Said paragraph was clearly sufficient. *Boyd v. Radabaugh*, 150 Ind. 394, 395, 396, and cases cited. This paragraph of answer brought appellant within the statute which provides that "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract as to her, shall be void." §6964 Burns 1894, §5119 R. S. 1881 and Horner

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1897. It is true that a married woman may be estopped by her acts from asserting her suretyship in order to avoid a contract. *Ward v. Berkshire Ins. Co.*, 108 Ind. 301; *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Orr v. White*, 106 Ind. 341. But, even if it were proper to anticipate a defense, the facts alleged in the second paragraph are not sufficient to estop appellant from showing her suretyship. The rule is that when an estoppel is relied upon, it must be set forth with particularity and precision, and nothing can be supplied by intendment or inference, and, when there is ground for inference or intendment, it will be against, and not in favor of an estoppel. *Dudley v. Pigg*, 149 Ind. 363, 371, and cases cited. Several essential elements of an estoppel are not set forth in said second paragraph of complaint. *Ward v. Berkshire Ins. Co.*, *supra*; *Roberts v. Abbott*, 127 Ind. 83, 89; *Hosford v. Johnson*, 74 Ind. 479, 485; *Dudley v. Pigg*, *supra*; *Chaplin v. Baker*, 124 Ind. 385, 390. The allegations in said second paragraph of complaint heretofore set forth, which were not contained in the first paragraph, imposed no additional burden upon appellee. All that was necessary to make a *prima facie* case against appellant under either paragraph of the complaint was to read in evidence the note and mortgage sued upon. It follows that the court erred in sustaining the demurrer to the third paragraph of answer.

It is insisted by appellee that "The error, if any, in sustaining the demurrer to the third paragraph of answer, was harmless, because the same evidence was admissible under the fourth paragraph of answer." The rule in this State is that when a demurrer for want of facts has been erroneously sustained to one or more paragraphs of a pleading, and other paragraphs are left standing, under some or all of which the pleader is entitled to the same relief or defense without any other or greater evidence than would have been required under the paragraph or paragraphs erroneously held bad, the error is harmless. But the error is not harmless if the para-

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graph or paragraphs allowed to stand impose upon the pleader the burden of adducing more or different evidence than would have been necessary under the paragraph or paragraphs erroneously condemned. *Hormann v. Hartmetz*, 128 Ind. 353, 354, 355; *Lester v. Brier*, 88 Ind. 296; *City of Elkhart v. Wickwire*, 87 Ind. 77, 79; *Caviness v. Rushton*, 101 Ind. 500, 503, 51 Am. Rep. 759; *Metzger v. Hubbard*, 153 Ind. 189, 195, 196, and cases cited.

The fourth paragraph of answer sets forth the same facts as the third, with the additional element that appellee had knowledge of the facts alleged in said paragraph. The court by sustaining the demurrer to the third paragraph of answer, and overruling the same to the fourth, adopted the theory that appellant, in order to make out her defense of suretyship and coverture, was required, not only to prove the facts showing such suretyship and coverture, but that appellee had knowledge of all such facts when he made the loan. This theory was erroneous, for the reason that appellant was not required to allege or prove such knowledge on the part of appellee. To sustain the fourth paragraph of answer, which was held good, proof of appellee's knowledge of the facts therein alleged was required, which proof was not necessary to sustain the third paragraph of answer, which the court erroneously held insufficient. As the fourth paragraph, therefore, imposed a burden on appellant not imposed by the third paragraph, which was clearly good, the error of the court in sustaining the demurrer to said paragraph was not harmless. To the extent that *Kniss v. Holbrook*, 16 Ind. App. 229, holds a contrary doctrine, the same is disapproved. As the questions presented by the motion for a new trial may not arise on a second trial, the same are not considered.

Judgment reversed, with instructions to overrule the demurrer to the third paragraph of answer, and for further proceedings not inconsistent with this opinion.

THE CITIZENS STREET RAILROAD COMPANY v. HEATH.

[No. 19,002. Filed December 22, 1899.]

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156 602

APPEAL AND ERROR.—*Certiorari*.—*Affidavits*.—Neither affidavits nor parol evidence will be accepted or considered for the purpose of contradicting the facts averred in a petition for a writ of *certiorari*. p. 365.

SAME.—*Certiorari*.—*Record*.—A writ of *certiorari* will not be granted for the purpose of expunging from the bill of exceptions an exhibit embodied therein at the time the bill was signed and approved by the trial judge, where it is shown by the record that the original bill was filed in the clerk's office of the lower court instead of a transcript thereof. p. 366.

SAME.—*Record*.—*Correction*.—*Certiorari*.—Where a paper through mistake, inadvertence, or otherwise, has been improperly made a part of the bill of exceptions the remedy is to apply to the lower court to have the bill properly corrected, and, when so corrected, it may be brought to the Supreme Court by a writ of *certiorari*. pp. 366, 367.

From the Hendricks Circuit Court. *Petition for certiorari granted in part and denied in part.*

Ferdinand Winter, W. H. Latta, E. G. Hogate and J. L. Clark, for appellant.

W. J. Beckett, for appellee.

JORDAN, J.—Appellee in this cause has filed an application for a writ of *certiorari* to be issued to the clerk of the lower court to correct certain alleged errors and omissions existing in the record of the appeal filed in this court. The application is duly verified by the oath of the petitioner, and substantially states that the plaintiff's bill of exceptions number two is defective in this: That what purports to be Exhibit A at page 154 of the stenographer's report of the evidence, as incorporated in the bill of exceptions, is not the original Exhibit A, and is not a copy of the said exhibit; that appellee never at any time agreed to substitute what purports to be Exhibit A for the original thereof, and he never agreed that what purports to be such exhibit, in said transcript at

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page 154, was a copy of the original Exhibit A, and never authorized any one to make an agreement for him to the above effect, etc.

It is further charged that the record in this cause is also defective in this: That the complaint is not properly or correctly copied into the transcript; that what purports to be a copy of the complaint, as set forth in said transcript, commencing at page three and extending to and including page five, is not a true copy of said original complaint; that the clerk of the lower court, in copying said complaint, has omitted therefrom "words", "phrases" and "clauses"; and what appellee alleges is a true and correct copy of the complaint is set out in the petition.

It is further alleged and specified in the application that the words omitted by the clerk in transcribing said complaint are the following, to wit: The words "as aforesaid" have been omitted between the words "signal" and "the", in line twenty-seven, page four of said transcript; also that the words "without fault on her part or part of plaintiff" have been omitted in said transcript between the words "back" and "causing", in line eleven, page five of the transcript. Also that the words "so received" have been omitted between the words "injuries" and "have", in line sixteen, page four of the transcript. The transcript, it is charged, is further defective in this, to wit: The word "execution" has been omitted from plaintiff's amended second paragraph of the reply to defendant's second paragraph of answer, and the word "exclusive" has been substituted therefor, in line sixteen, page fifty-two of the transcript. What is alleged to be a perfect copy of the amended second paragraph of plaintiff's reply to defendant's amended second paragraph of answer is set out in the petition. It is further averred that all of said omissions, insertions and erroneous entries are prejudicial to plaintiff's rights in this court, and that a correction of said record is necessary and material to the legal rights of appellee, and for a proper determination of said cause.

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The petitioner prays that the court direct a writ of *certiorari* to issue requiring the clerk of the lower court to certify to this court the following original papers, to wit: (1) Plaintiff's original Exhibit A, or to show the fact, if any, as to why said exhibit can not be produced; (2) plaintiff's original complaint; (3) plaintiff's amended second paragraph of reply to defendant's amended second paragraph of answer, and for all other and proper relief in the premises.

Appellant, in response to notice, has appeared to this application, and strenuously insists that the petition for the writ be in all things denied. Numerous affidavits have been filed and presented to the court by appellant tending to contradict the averments of the application or petition. In order to rebut or countervail the matters and things stated in appellant's counter-affidavits, appellee has been diligent upon his part in filing and presenting affidavits; and an issue in respect to the truth of the averments of the application is, under these several affidavits, attempted to be raised by the parties, which this court is asked to determine upon the statements therein made by the respective affiants. This we decline to do, and it is needless, perhaps, to say that we have not considered the affidavits in question, for the reason that, under a well settled rule of practice pertaining to the hearing of a petition for a writ of *certiorari*, neither affidavits nor parol evidence will be accepted or considered by the court for the purpose of contradicting such petition. Ewbank's Manual, §212. While affidavits in support of a petition may be received and considered, still, as a general rule, when the petition is duly verified, and discloses merits under the facts therein stated, the court will usually grant the writ from the *prima facie* case presented under the petition. Vol. 4 Ency. Pl. & Pr. pp. 197, 198. Of course we may, and usually do, when it is deemed essential to a proper hearing of an application for a writ of *certiorari*, inspect the record on file in the particular appeal. A part of the relief demanded by the petitioner is that this court, by means of the

writ, expunge from the bill of exceptions what he denominates a "false exhibit". An examination of the record on file in this cause discloses that the bill of exceptions, embracing the evidence given upon the trial below, is the original bill filed in the office of the clerk of the lower court, and that the same, instead of a transcript thereof, has been, under the authority of the statute, duly certified to this court. It further appears, by inspection of the bill, that what purports to be Exhibit A, given in evidence, is copied into and made a part of said bill of exceptions. The trial judge, who signed the bill, certifies therein that it is a true and correct bill of exceptions containing all of the evidence given upon the trial of the cause.

The settling of a bill of exceptions, so as to cause it to express or speak the truth, is a judicial act, and it is the duty of the trial judge to ascertain if the bill is complete and correct before he signs it. Elliott's App. Proc. §§798, 810. This court has repeatedly asserted that a bill of exceptions, properly within the record of a cause on appeal, "imports absolute verity" and can not, in this court, be contradicted, except only such contradictions as affirmatively appear from the bill itself.

What the petitioner seems in part to be seeking, as previously said, is to have this court amend or change the bill in question by expunging therefrom the paper in dispute, which paper appears to have been embodied therein at the time the bill was signed and approved by the trial judge. If we were to make the change desired, it would not be correcting the record in this court so as to make it respond to the record as made below, but we would be making a record different from that made in the lower court. This, it is clear, we are not authorized to do. If the paper in controversy, through mistake, inadvertence, or otherwise, has been improperly made a part of the bill, then the remedy of the appellee is to apply to the lower court to have the bill properly corrected, and, when so corrected, it may be brought

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to this court by a writ of *certiorari*. *Drake v. State*, 145 Ind. 210; Elliott's App. Proc. §206; *Burton v. Ferguson*, 69 Ind. 486; Ewbank's Manual, §§34, 37. In the case last cited, there was an attempt to show to this court, by affidavits, that the bill of exceptions in that cause was altered after it had been signed by the trial judge. Worden, J., speaking for the court in that appeal, said: "We can not try the correctness of a record on affidavit, but must take it as correct, as it comes up to us under the hand and seal of the clerk of the court below. If it is wrong, the remedy of the party complaining is to have it corrected in the court below, and the corrected record may be sent to us on *certiorari*."

So far as rule thirty-two of this court can be said to be in conflict with this opinion, in regard to the holding herein, that counter-affidavits will not be considered to contradict a petition for a writ of *certiorari*, it, to that extent, must be deemed to be rescinded.

We conclude, therefore, that appellee is entitled to be awarded the writ to have the complaint upon which the cause was tried below correctly certified to this court, and also to have certified his amended second paragraph of reply to the defendant's amended second paragraph of its answer. The petition, so far as it seeks to secure the writ to expunge Exhibit A, as it appears in the bill of exceptions, is, for the reasons stated, denied. If the clerk of the lower court shall be satisfied that the pleadings mentioned herein, for which the writ is allowed, have been already correctly certified to this court, as they actually existed upon the trial of the cause, he can return the facts accordingly. The clerk of this court will issue forthwith a writ of *certiorari* as herein directed.

Ray v. Moore, Adm.

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167 123**RAY v. MOORE, ADMINISTRATOR.**

[No. 18,792. Filed March 27, 1900.]

APPELLATE COURT.—Jurisdiction.—Decedents' Estates.—The Appellate Court has jurisdiction of all cases wherein claims against decedents' estates are allowed, or allowance refused.

From the Montgomery Circuit Court. *Transferred to the Appellate Court.*

Paul, Van Cleave & Paul, A. D. Thomas and W. T. Whittington, for appellant.

B. Crane and A. B. Anderson, for appellee.

MONKS, J.—Appellant filed a verified claim against the estate of Eli H. Dick, deceased, on a note for \$10,000, alleging that there was due thereon the sum of \$10,722, which was wholly unpaid. Said claim was placed on the appearance docket, and afterwards transferred to the issue docket for trial. The cause was tried by a jury, and a verdict returned in favor of appellee, upon which, over appellant's motion for a new trial, judgment was rendered against appellant.

It is provided in the sixth clause of §1336 Burns 1894 that the Appellate Court shall have exclusive jurisdiction of appeals in all cases wherein claims against decedents' estates are allowed, or allowance refused. In this case the allowance was refused, and the jurisdiction of this appeal is in the Appellate Court, unless some other clause or section gives jurisdiction to this court.

The classes of cases of which the Appellate Court is given exclusive jurisdiction by all the clauses of §1336 Burns 1894, except the second and third, do not depend upon the amount in controversy, but the jurisdiction in those cases is in the said court without regard to the amount in controversy.

The second clause of said section gives exclusive jurisdiction to the Appellate Court of all appeals from judgments rendered in the cases which originated before a justice of the

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peace, and in which the amount in controversy, exclusive of interest and costs, exceeds \$50.

The third clause of said section gives exclusive jurisdiction to the Appellate Court of all actions for the recovery of a money judgment only, where the amount in controversy, exclusive of costs, does not exceed \$3,500.

Section 1337 Burns 1894 provides that the Appellate Court shall also have jurisdiction in all cases for the foreclosure or the enforcement of liens of purely statutory origin, where the amount in controversy does not exceed the sum of \$3,500.

It is provided in said §1336 Burns 1894, that the Appellate Court shall not have jurisdiction in any of the cases mentioned therein, if the constitutionality of a statute, federal or State, or the validity of an ordinance of a municipal corporation is in question, and such question is duly presented, or when the title to real estate is in issue, or if the same is a suit in equity, meaning thereby such a case as was known and recognized prior to the 18th day of June, 1852, as a suit of equitable cognizance, and wherein a specific decree was appropriate and essential. It is settled that the jurisdiction of all appeals not expressly given to the Appellate Court is in the Supreme Court. Elliott's App. Proc. §§25, 26, 34, 35; Ewbank's Manual, §58; *Ex parte Sweeney*, 126 Ind. 583.

It is evident that all appeals of which the Appellate Court is given exclusive jurisdiction, except those specified in the second and third clauses of said §1336, *supra*, and §1337 Burns 1894, the same is given without regard to the amount in controversy. Elliott's App. Proc. §§65, 66, 70; Ewbank's Manual, §69.

Jurisdiction of this appeal is expressly given to the Appellate Court by clause six of §1336, *supra*, and as it does not fall within any of the exceptions mentioned in said section, although the amount in controversy is over \$3,500, the jurisdiction is in said court. This cause is therefore transferred to the Appellate Court.

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ÆTNA LIFE INSURANCE COMPANY v. SELLERS ET AL.

[No. 18,615. Filed March 27, 1900.]

PLEADING.—*Demurrer.*—*Insane Persons.*—A cross-complaint which affirmatively shows the cross-complainant's want of capacity to maintain his suit is not bad as against a demurrer for want of facts. *p. 371.*

INSANE PERSONS.—*Contracts.*—The contract of an insane person who was not under guardianship at the time of the execution of the contract, is voidable only, and not void. *p. 371, 372.*

PLEADING.—*Insane Persons.*—*Contracts.*—*Disaffirmance.*—A complaint by an insane person, not under guardianship, seeking the foreclosure of a mortgage which had been released of record, disclosing grounds on which the release might have been disaffirmed, but not pleading a disaffirmance of the release, discloses no right of action. *pp. 372, 373.*

From the Wells Circuit Court. *Reversed.*

F. C. Dailey, A. Simmons, J. S. Dailey and H. C. Pettit, for appellant.

A. N. Martin and W. H. Eichhorn, for appellees.

BAKER, J.—Appellant began this suit to foreclose a mortgage executed to it in June, 1889, by Kerlin B. Sellers on lands in Wells county. Appellee Richard P. Sellers filed a cross-complaint in two paragraphs to foreclose a mortgage on the same land executed by Kerlin B. Sellers in March, 1860. Appellant's demurrer to the cross-complaint was overruled. Answer of general denial, of payment, and of release of appellee's mortgage. Reply of general denial of payment and release, and of an argumentative denial of payment. Appellee Richard P. Sellers did not answer appellant's complaint. There were various pleadings by other parties, but no question arises respecting them. Special finding of facts and conclusions of law. Decree, foreclosing appellee's mortgage. Appellant's motion for a new trial overruled. The errors assigned involve the cross-complaint of Richard P. Sellers, the conclusions of law, and the motion for a new trial.

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The first paragraph of cross-complaint alleges that Kerlin B. Sellers on March 8, 1860, executed his six months note for \$1,790 to Benjamin Klahr and Benjamin Kline, executors of the last will of Philip Kline, deceased, and secured it by the mortgage of himself and wife upon the land in question; that the mortgage was duly recorded, etc.; that copies of the note and mortgage are attached, etc.; that on January 31, 1876, the payees of the note duly indorsed and delivered it to cross-complainant; that on August 1, 1889, a proper assignment of the mortgage was executed to cross-complainant and duly recorded on the same day; that on August 3, 1889, "the plaintiff and other persons procured this cross-complainant to execute a pretended release of his interest in said mortgage and mortgage debt, and caused the same to be entered of record in the office of the recorder of said county; that at the time of the execution by this cross-complainant of said pretended release and long prior thereto, the cross-complainant was and had been a person of unsound mind and utterly incapable of understanding the nature of such or of any instrument; that said pretended release was without consideration; that ever since the execution of such pretended release the cross-complainant has continued to be and now is a person of unsound mind; that at the time of the execution of said pretended release the plaintiff had notice and knowledge that this cross-complainant was then and there a person of unsound mind and has had such notice ever since"; that the debt remains due and unpaid, etc.; and prays that the release be set aside and the mortgage foreclosed.

Cross-complainant's want of capacity to maintain his suit affirmatively appears; but, as the demurrer assigned only the want of sufficient facts, the defect was waived. §339 R. S. 1881 and Horner 1897, §342 Burns 1894; *Wade v. State*, 37 Ind. 180; *Edwards v. Beall*, 75 Ind. 401.

It is thoroughly settled in this State that the executed contract of an insane person, who is not under guardianship

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at the time, is voidable only, and not void. *Crouse v. Holman*, 19 Ind. 30; *Somers v. Pumphrey*, 24 Ind. 231; *Musselman v. Cravens*, 47 Ind. 1; *Nichol v. Thomas*, 53 Ind. 42; *Freed v. Brown*, 55 Ind. 310; *Wray v. Chandler*, 64 Ind. 146; *Hardenbrook v. Sherwood*, 72 Ind. 403; *McClain v. Davis*, 77 Ind. 419; *Schuff v. Ransom*, 79 Ind. 458; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Copenrath v. Kienby*, 83 Ind. 18; *Northwestern Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *College v. Wilkinson*, 108 Ind. 314; *Boyer v. Berryman*, 123 Ind. 451; *Ashmead v. Reynolds*, 127 Ind. 441; *Louisville, etc., R. Co. v. Herr*, 135 Ind. 591; *Thrash v. Starbuck*, 145 Ind. 673.

Until disaffirmed, the voidable executed contract, in respect to the property or benefits conveyed, passes the right or title as fully as an unimpeachable contract. By ratification, it becomes impervious; by disaffirmance, a nullity. And as such a contract may be ratified, whether the beneficiary was ignorant of the grantor's infirmity or obtained the benefit by means of his knowledge of the disability, so, in either case, disaffirmance is necessary in order to reduce the contract to nothingness. *Schuff v. Ransom*, 79 Ind. 458; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Ashmead v. Reynolds*, 127 Ind. 441; *Louisville, etc., R. Co. v. Herr*, 135 Ind. 591.

In this suit the cross-complainant, an insane person not under guardianship, asked the foreclosure of a mortgage which the first paragraph of his pleading affirmatively showed had been released by him. The pleading discloses grounds on which the release might be disaffirmed. But no disaffirmance is pleaded. Until disaffirmed, the release stood as a voidable executed contract,—not a void one; and this paragraph of cross-complaint, therefore, disclosed no right of action. *Nichol v. Thomas*, 53 Ind. 42; *Schuff v. Ransom*, 79 Ind. 458; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *College v. Wilkinson*, 108 Ind. 314; *Ashmead v. Reynolds*, 127 Ind. 441; *Louisville, etc., R. Co. v. Herr*, 135 Ind. 591; *Thrash v. Starbuck*, 145 Ind. 673. The same rule,

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of course, applies to contracts voidable on account of infancy or other disability. *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68; *Long v. Williams*, 74 Ind. 115. The defect in failing to aver disaffirmance goes to the substance of the case, for disaffirmance is a condition precedent to the right of action. The principle involved is similar to that in a case for the recovery of an estate on account of the breach of a condition subsequent in a deed, wherein the complaint must show not only the breach, but also a forfeiture, on account of the breach, effected by reëntry or demand, prior to the filing of the complaint. *Preston v. Bosworth*, 153 Ind. 458. The only cases in this State that might be considered out of line with the numerous authorities above cited are *Hull v. Louth*, 109 Ind. 315; and *Lange v. Dammier*, 119 Ind. 567; and they were distinguished in *Ashmead v. Reynolds*, 127 Ind. 441.

In this paragraph not only is there a failure to allege disaffirmance, but there is a direct disclosure of the incapacity of the cross-complainant to disaffirm. *Nichol v. Thomas*, 53 Ind. 42; *Louisville, etc., R. Co. v. Herr*, 135 Ind. 591.

The second paragraph of the cross-complaint set forth the same facts as the first, except that it contained no reference to the release. The answer pleaded the release. The reply was a general denial. As appellant's demurrer was addressed to the cross-complaint as an entirety, there was no available error in overruling it, since the second paragraph was good. But under the issues formed on this paragraph, the errors that were embodied in the first paragraph were carried throughout the trial. In the special finding and in the evidence, no disaffirmance is shown, but a want of capacity to disaffirm is disclosed.

Judgment reversed, with directions to sustain appellant's motion for a new trial.

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[No. 19,179. Filed March 27, 1900.]

APPEAL AND ERROR.—*Correction of Record.*—An appeal from a proceeding to correct the record of a case pending on appeal will not be considered unless the transcript of such proceeding is filed as a part of the original appeal.

From the Wells Circuit Court. *Appeal dismissed.*

H. C. Pettit, F. C. Dailey, A. Simmons and J. S. Dailey,
for appellant.

Mock & Sons, G. T. Williamson, A. N. Martin and W. H. Eichhorn, for appellees.

BAKER, J.—While the appeal of *Ætna Life Ins. Co. v. Sellers*, ante, 370, decided at this term, was pending, the appellee began proceedings in the trial court to correct the record of the original case by supplying an exhibit to his cross-complaint and by correcting the bill of exceptions containing the evidence. The trial court corrected the record, and the corrections were brought to this court on appellee's application by *certiorari*, as a part of the pending appeal. In this appeal, the transcript contains the proceedings had on appellee's application to the trial court to correct its record. As those proceedings were auxiliary to the original cause, this transcript should have been filed as a part of the original appeal, if appellant desired to question the trial court's rulings in making the corrections. *Hamilton v. Burch*, 28 Ind. 233; *Seig v. Long*, 72 Ind. 18; *Hannah v. Dorrell*, 73 Ind. 465; *Tomlinson v. Harris*, 130 Ind. 339; *Driver v. Driver*, 153 Ind. 88; *Ewbanks's Manual*, §214.

Appeal dismissed.

Bruce v. Osgood.

BRUCE ET AL. v. OSGOOD ET AL.

[No. 18,648. Filed Jan. 23, 1900. Rehearing denied March 27, 1900.]

PRACTICE.—*Harmless Error.*—Overruling a demurrer to an answer was harmless where defendant was entitled to introduce under the general denial his whole defense to the paragraph of complaint to which the answer was addressed if plaintiff's evidence fails to make out a case. *pp. 375, 376.*

JUDGMENTS.—*Collateral Attack.*—The judgment of the circuit court that it had jurisdiction of a certain case is impervious to collateral attack. *pp. 377, 378.*

SAME.—*Complaint.*—Where a complaint challenged defendant to show any cause he had why a judgment should not be enforced against certain land, the judgment ordering a sale of the land bound every interest defendant had in the land. *p. 378.*

COURTS.—*Judgments.*—It is the duty of a court to give full faith and credit to a judgment, fair on its face, rendered by a domestic court of coördinate jurisdiction. *pp. 378, 379.*

From the Marion Circuit Court. *Affirmed.*

W. V. Rooker, for appellants.

Frank Cutter and A. C. Harris, for appellees.

BAKER, J.—James Bruce began this action to quiet his title to certain lands in Marion county, and to have a judgment held by Osgood declared null and void. Osgood answered by general denial of the whole complaint and by an affirmative paragraph addressed to the paragraph of complaint to quiet title. Appellants, who are the heirs of James Bruce, were substituted as plaintiffs. At the conclusion of the introduction of evidence, the court directed a verdict in favor of Osgood. Appellants assign that the court erred in overruling their demurrer to Osgood's affirmative answer and in overruling their motion for a new trial.

If the answer was bad, appellants were not harmed, since Osgood was entitled to introduce under the general denial his whole defense to the paragraph to which the affirmative answer was addressed, and the court directed the verdict on the evidence in support of the complaint and answer of gen-

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eral denial, as the record affirmatively shows. If the pleading be a cross-complaint, as appellants assert, the ruling was not prejudicial, for the judgment is merely that appellants take nothing by their complaint.

In the motion for a new trial, fifty grounds are stated, involving the rulings on the admission and exclusion of evidence, the refusal of instructions requested, and the direction of the verdict. Three propositions, however, cover the case.

They arise on these facts: One George Bruce had good record title to the land in question from 1853 to his death in 1885. George deeded the land to James Bruce, the original plaintiff, on October 6, 1881. James had the deed recorded on October 7, 1892. He began this action on February 15, 1892. On March 5, 1878, three judgments, one by Osgood and two by other plaintiffs, were recovered in the Marion Superior Court against George Bruce. On January 23, 1888, Osgood brought his action, under §621 R. S. 1881 and Horner 1897, §633 Burns 1894, against James Bruce and John Bruce, who were the only heirs at law of George Bruce, then deceased, to require them to show cause why the judgments should not be enforced against the land in question. The verified complaint alleged that Osgood owned the judgments and that they were unsatisfied, specified the amount due on each, described the land sought to be charged, averred that George Bruce died in May, 1885, wholly insolvent and intestate, leaving the defendants as his sole heirs at law, and prayed that the judgments might be revived and defendants required to show cause, if any there was, why the judgments should not be enforced against this land. The record of that proceeding shows that the defendants appeared and filed a general denial; that on February 14, 1888, the parties by agreement submitted the issues to the court for trial; and that the court rendered a judgment for the plaintiff that he was the owner of the judgments, that there was a certain sum due on each, that the judgments were liens

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on this land (particularly described), and that the plaintiff was entitled to a sale thereof on execution. Sale was made to Osgood on March 17, 1888, and sheriff's deed on March 20, 1889. There was a large volume of evidence offered by appellants for the purpose of showing that James Bruce had an equitable title to the real estate in controversy prior to the rendition of the three judgments of March 5, 1878; that no administration was ever had upon the estate of George Bruce; and that the judgment of February 14, 1888, against James and John Bruce had been obtained by the fraud of Osgood with the assistance of Bruces' attorney. The questions are: Is the judgment of February 14, 1888, void upon its face? Does it bar the title of James Bruce acquired by purchase? Has the Marion Circuit Court any authority in law to set aside the judgment of the Marion Superior Court for fraud in its rendition?

The record of the judgment shows an appearance and the filing of an answer by Bruces. So the question is narrowed to one of jurisdiction of the subject-matter. The Marion Superior Court had jurisdiction to render the three judgments of March 5, 1878. §1351 R. S. 1881 and Horner 1897, §1404 Burns 1894. That court was the proper one in which to bring the action to revive and enforce the judgments after the death of the judgment debtor. §621 R. S. 1881 and Horner 1897, §633 Burns 1894. The chief objection urged against the complaint in that action is that it fails to state that letters of administration had been issued a year or longer before the action to revive was commenced and fails to make the administrator a party defendant. The complaint does not disclose that there was then any administrator or that the personal estate of George Bruce had not been fully administered upon and finally settled. Those and similar matters were defenses for the defendants to avail themselves of by demurrer or answer. But even if the complaint had stated those facts, it might well be held that the judgment was not void. Appellants' arguments in this case

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would apply as forcibly to a judgment on a note which the complaint showed was not due, and would lead to the conclusion that, because the complaint in truth disclosed a lack of right in plaintiff to maintain the action, the judgment would be void. This has been decided otherwise. *DeHaven v. Covalt*, 83 Ind. 344; *Robertson v. Huffman*, 92 Ind. 247. The question is not whether in truth, as this court might decide on appeal, the Marion Superior Court had jurisdiction in the particular case, but whether or not that court was competent to decide that it had jurisdiction and whether it must have so decided before proceeding to judgment. The statutes above referred to gave the court jurisdiction to entertain and decide actions of this class. Whether or not the particular case in question actually belonged to the class, is immaterial. The court was called upon to decide whether it did or not. Its judgment, if conceded to be wrong, is impervious to collateral attack. *State v. Jackson*, 118 Ind. 553; *Jackson v. Smith*, 120 Ind. 520, and cases collated on p. 523; *Alexander v. Gill*, 130 Ind. 485; *Tucker v. Sellers*, 130 Ind. 514; *Evansville, etc., Co. v. Winsor*, 148 Ind. 682; Van Fleet's Col. Att. §66.

It is claimed that the judgment of the Marion Superior Court, if valid, bound only the defendants' interest in the land derived as heirs of George Bruce and is not a bar to the title of James Bruce acquired by purchase. The complaint challenged James Bruce to show any cause he had why the judgments of March 5, 1878, should not be enforced against the land in controversy. The judgment ordering the sale bound every interest he had. *Armstrong v. Hufty* (Ind. Sup.), 55 N. E. 443, and authorities there collated.

The Marion Circuit Court did right in giving full faith and credit to a judgment, fair on its face, rendered by a domestic court of coördinate jurisdiction. It is to be presumed that the Marion Superior Court would promptly purge its records of any judgment tainted with fraud, if a direct proceeding for that purpose were brought before that

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court; but to do so, in any way, was not a prerogative of the Marion Circuit Court. *Hutton v. Denton*, 2 Ind. 644; *White Water, etc., Co. v. Henderson*, 3 Ind. 3; *Cline v. Crump*, 11 Ind. 125; *Indiana, etc., R. Co. v. Williams*, 22 Ind. 198; *Gregory v. Perdue*, 29 Ind. 66; *Coleman v. Barnes*, 33 Ind. 93; *Wiley v. Pavey*, 61 Ind. 457, 28 Am. Rep. 677; *Nealis v. Dicks*, 72 Ind. 374; *Sauer v. Twining*, 81 Ind. 366; *Anderson v. Wilson*, 100 Ind. 402; *Hall v. Durham*, 109 Ind. 434; *Weiss v. Guerineau*, 109 Ind. 438; *Jones v. Bittinger*, 110 Ind. 476; *Nicholson v. Nicholson*, 113 Ind. 131; *Brown v. Grove*, 116 Ind. 84; *Plunkett v. Black*, 117 Ind. 14; *Bateman v. Miller*, 118 Ind. 345; *Palmerton v. Hoop*, 131 Ind. 23; *Black v. Plunkett*, 132 Ind. 599; *Board, etc., v. Stout*, 136 Ind. 53; *Hollinger v. Reeme*, 138 Ind. 363, 24 L. R. A. 46; *Scott v. Runner*, 146 Ind. 12; *Van Fleet's Col. Att. §550*. The case of *Kirby v. Kirby*, 142 Ind. 419, as to what constitutes a direct and what a collateral attack, is disapproved.

From these considerations, it follows that the evidence concerning fraud was properly disregarded, that the evidence of infirmities not apparent on the face of the record was properly excluded, that the evidence admitted in aid of the record was immaterial and harmless, and that the withdrawal of the case from the jury was right.

Judgment affirmed.

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[No. 19,080. Filed March 28, 1900.]

APPEAL AND ERROR.—Evidence.—Bill of Exceptions.—The act of 1897 (Acts 1897, p. 244) prescribing the manner in which the evidence may be made a part of the record on appeal does not require that the evidence be first filed with the clerk of the trial court before it is incorporated into the bill of exceptions. pp. 381, 382.

SAME.—Evidence.—Transcript.—Bill of Exceptions.—The report of the evidence under the act of 1897 may be made by the stenographic method, or the evidence may be taken down in longhand, and then

154	379
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156	585
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160	190
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161	511
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162	125
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164	381
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171	671

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embodied in the bill of exceptions, and such original bill, when filed as provided by said act may be certified to the Supreme Court without being transcribed. *p. 332.*

APPEAL AND ERROR.—Evidence.—Bill of Exceptions.—Where it appears from the record that the bill of exceptions containing the evidence was signed by the trial judge and filed in open court, it will be presumed, nothing appearing to the contrary, that the bill was filed after being signed by the judge. *p. 332.*

SAME.—Bill of Exceptions.—Where the record showed that the cause was tried at the September term and the findings announced at the next term of court, at which time appellant filed a motion for a new trial, and on the same day filed in open court his bill of exceptions containing the evidence, and the motion for a new trial was not passed upon until the next term of court, the evidence was properly in the record, although it was not shown that time was given in which to file the bill of exceptions. *pp. 332-334.*

OFFICERS.—Failure to Qualify.—School Trustee.—Where one appointed as school trustee failed to qualify within the time fixed by statute, and the town trustees appointed another person to fill the office, the title of the former to the office was thereby forfeited, and his attempt to qualify thereafter did not revive or restore his title. *pp. 334-332.*

From the Henry Circuit Court. *Reversed.*

M. E. Forkner, for appellant.

W. A. Brown, for appellee.

JORDAN, J.—This is an action by information instituted by the State on the relation of its prosecuting attorney to oust appellant, an alleged usurper of the office of school trustee of the school town of Sulphur Springs, Henry county, Indiana.

A trial by the court resulted in a finding in favor of the State. The court thereupon rendered its judgment ousting said appellant from his said office, and directed that he turn over all books and papers thereof to one Burton O. Post; and judgment was rendered against appellant for cost. From this judgment he appeals, and the principal error assigned is the overruling of his motion for a new trial.

At the very threshold we are confronted with the insistence of counsel for appellee that the evidence upon which

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this cause was tried is not in the record. The transcript discloses that the cause was tried at the September term, 1898, of the Henry Circuit Court; and after hearing the evidence, the court took the cause under advisement. On the 31st judicial day of the November term next following, the court announced its finding against appellant. On the 53rd judicial day of said November term, being January 20, 1899, appellant filed his motion and reasons for a new trial; and on the same day filed his bill of exceptions embracing the evidence. This bill appears to have been signed by the trial judge on December 20, 1899, and it is ordered therein that it be made a part of the record in this cause. The motion for a new trial was taken under advisement by the court until the February term, 1899, which was the term next following that of the November term. The motion was overruled at the said February term and final judgment was then rendered.

Counsel for appellee insists that the evidence is not in the record for three reasons: (1) It does not affirmatively appear that the longhand manuscript of the evidence, taken by the shorthand reporter, was filed with the clerk of the court before it was embodied in a bill of exceptions; (2) that it does not appear that the bill of exceptions was filed after it was signed by the judge; (3) that the record does not affirmatively disclose that any time was granted by the court to appellant to file his said bill of exceptions.

In regard to the first contention, it is sufficient to say that the statute approved March 8, 1897 (Acts 1897, p. 244), which prescribes the manner in which the evidence in a cause may become a part of the record on appeal to this court, does not require that the evidence be first filed with the clerk of the trial court before it is incorporated into a bill of exceptions; and, hence, decisions of this court which were made in reference to the act of 1873 (Acts 1873, p. 194), to the effect that the record must affirmatively show that the longhand manuscript of the evidence was filed with

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the clerk before it was incorporated into a bill of exceptions, can have no application.

Under the law of 1897, the method employed to report the evidence given upon a trial is not essential. The report thereof may be made by the stenographic method, or the evidence may in the first instance be taken down in longhand and then embodied in the bill of exceptions; and such original bill, when filed as provided by the said act, may be certified to this court without being transcribed. Ewbank's Manual, §35, and cases there cited.

The bill of exceptions containing the evidence in this case appears to have been signed by the judge and filed in open court on January 20, 1899. We are therefore bound to presume, under such circumstances, nothing to the contrary appearing, that the bill was filed after it had been signed by the trial judge. This disposes of appellant's second contention.

The trial of this cause, as we have stated, occurred at the September term, 1898, of the lower court. The court's finding was not announced until the next term, being the November term following. At the same term that the court announced its finding, appellant filed his motion for a new trial. Immediately after filing this motion, on the same day, he filed in open court his bill of exceptions containing the evidence. The motion for a new trial was not overruled until the February term next following.

It is provided in §638 Burns 1894, §626 R. S. 1881 and Horner 1897, that an exception must be taken by the objecting party to the decision of the court at the time it is made; but time may be given to reduce the exception to writing, but not beyond the term unless by special leave of court. It is further provided by this section that, if a motion for a new trial be filed, in which such decision is assigned as a reason therefor, such motion shall carry such decision and exception thereto forward to the time of ruling on the motion; and time may then be given within which to reduce

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such exception to writing. All that part of the above mentioned section which precedes the proviso is identically the same as the section existed in the code of 1852 (§343, 2 Davis 1876 p. 176), and the provisions therein that time may be given to reduce the exception to writing, but not beyond the term except by special leave of court, must be construed in connection with the proviso engrafted upon this section of our present code. This proviso in effect declares that when a motion for a new trial is filed in a cause, in which motion any decision of the court is properly assigned as a reason for a new trial, the motion shall operate to carry such decision and the exception thereto forward to the time of ruling upon the motion; and time may then be given to reduce such exception to writing. Or, in other words, the court may then grant time in which to prepare a bill of exceptions and present the same to the trial judge for settlement and signing.

In the case at bar, the bill, it is true, was filed at a term subsequent to the one at which the evidence was introduced, and the rulings and exceptions thereto were reserved. It was filed on the same day, however, immediately following the filing of the motion for a new trial. This latter motion, under the proviso of the section of the code in question, operated to carry forward all the rulings or decisions of the court, which were and could be legitimately assigned as grounds for a new trial, to the time of filing the motion and up to and including the time at which the motion was denied.

By reason of the force and effect of said proviso, as we construe it, appellant was authorized as a matter of right to file the bill of exceptions in controversy, either at the term of court at which the trial was had, or at any time thereafter previous to the ruling upon his motion for a new trial, without first obtaining special permission of the court to do so. But in the event he had failed to file such bill prior to the ruling upon said motion, he would have been required, when the motion was overruled, to obtain a grant of time in which

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to prepare and present to the trial judge his bill of exceptions. If the bill, however, had been filed subsequent to the ruling upon the motion for a new trial, but before the close of the same term, under such circumstances, even if the record was silent in respect to the granting of time, this court would presume that time had been given, when the motion was overruled, in which to present the bill, and that such bill had been presented to the trial judge within the time allowed. But if it were properly disclosed upon appeal that the bill of exceptions was presented to the judge after the close of the term at which the motion for a new trial was denied, then, under such circumstances, the record entry of the order-book must affirmatively show that a time, which extended beyond such term, in which to prepare and present such bill to the trial judge for settlement and signature, was granted when the motion was overruled. Elliott's App. Proc. §804.

The bill of exceptions in question, however, was filed at a previous term of the court, after the filing of the motion for a new trial, and was already on file at the time the motion for a new trial was overruled. Certainly, then, under the circumstances, it can not in reason be claimed that the statute intended or required that appellant, at the time the motion was denied, should obtain leave to do that which he had already done. We therefore conclude that the bill of exceptions in dispute is properly a part of the record in this appeal.

We next address ourselves to the question,—does the evidence sustain the court's decision? The material facts which the evidence indisputably establishes are apparently as follows: The town of Sulphur Springs in Henry county, Indiana, is incorporated under the general laws of this State, and has been so incorporated for a period of about twenty years. On June 23, 1898, at a regular meeting of its board of trustees, Burton O. Post was by said board elected a school trustee for the school town of Sulphur Springs to fill a vacancy occasioned by the expiration of the term of one James

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Wright, then a member of the board of school trustees. Post was in all respects eligible to hold said office. No certificate of his election was issued to him, nor does it appear that he ever demanded such certificate. It is shown, however, that on June 24th, the day after his election, he was informed and notified that he had been elected a member of the board of school trustees. He did not take the oath of office after receiving such information nor did he make any effort to meet with the said board of school trustees. In fact, he did nothing whatever to qualify or be inducted into office or signify his intention to accept the same under said election except as hereinafter mentioned. This status of affairs seems to have continued until the 2nd day of August, 1898. On that day it appears that Mr. Hays, one of the hold-over members of the board of school trustees, filed his bond as treasurer of said board with the county auditor, intending to draw the school funds to which the board was entitled, but was informed by the auditor that he could not recognize the board for the reason that it had only two members. Hays, immediately upon his return home on that day, informed the board of trustees of the town of Sulphur Springs of the state of affairs and the claim made by the auditor. The board thereupon held a meeting on the evening of August 2nd, and elected George Minnick, the appellant, who in all respects was eligible to hold the office, a school trustee, the record made by the board at that meeting reciting that the object of the meeting was to elect a school trustee for the reason that Burton O. Post, who was elected at the meeting of June 23, 1898, had failed to qualify. A certificate of election was issued to Minnick, and on August 4th he took the official oath and filed his bond with the county auditor as secretary of the school board. On the day following the election of appellant, James Wright, whose place on the school board was intended to be filled by the election of Post, filed with the auditor his bond, as secretary of such board, with the said Burton O. Post as one of the sureties.

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thereon. This bond apparently was filed, as the evidence discloses, for the purpose of enabling Wright to continue in office. According to Post's own testimony, given on the trial, he admitted that on August 3, 1898, at the time when he signed Wright's bond, he made the following statement to Wright: "You are the old member of the board. You file your bond, and I will go on it and have Thompson take it to Newcastle and file it. If it is all right let me know." On August 5, 1898, the day after Minnick had taken the oath of office and filed his bond, as heretofore stated, Post also took the oath of office, and filed his bond, as secretary of the school board, with the county auditor. This was the first attempt made by him to qualify in any manner under his election of June 23, 1898. On August 6, 1898, at a meeting of the school board, appellant met as a member thereof, claiming under his said election, and the board recognized him as a member, and elected him as the secretary of the board. At the same meeting, Stout and Hays, the two hold-over members, were chosen as president and treasurer, respectively, and the board then adjourned to meet again on August 8th following. Post, it seems, after he had taken the steps to qualify, which he did on August 5th, made an attempt to meet with the school board as one of its members; but it seems that said board did not recognize him as such member.

Counsel for appellant insists that these facts do not sustain the judgment of the court in ousting appellant as a usurper of the office in question.

Section 5915 Burns 1894, §4439 R. S. 1881 and Horner 1897, which has been in force as amended since March 12, 1875, reads as follows: "The common council of each city and the board of trustees of each incorporated town of this State shall, at their first regular meeting in the month of June, elect three school trustees (who shall hold their office one, two, and three years respectively, as said trustees shall determine by lot at the time of their organization), and,

annually thereafter, shall elect one school trustee, who shall hold his office for three years. Said trustees shall constitute the school board of the city or town; and, before entering upon the duties of their office, shall take an oath faithfully to discharge the duties of the same. They shall meet within five days after their election, and organize by electing one of their number as president, one as secretary and one as treasurer. The treasurer, before entering upon the duties of his office, shall execute a bond, to the acceptance of the county auditor, conditioned as in ordinary official bonds, with at least two sufficient freehold sureties, who shall not be members of said board, in a sum not less than double the amount of money which may come into his hands, within any one year, by virtue of his office. The president and secretary shall each give bond, with like sureties, to be approved by the county auditor, in any sum not less than one-third of the treasurer's bond. All vacancies that may occur in said board of school trustees shall be filled by the common council of the city or board of trustees of the town; but such election to fill a vacancy shall only be for the unexpired term. The board of school trustees shall, each year, within five days after the annual election of a member, reorganize their board and execute their respective bonds for the ensuing year. Said trustees shall receive for their services such compensation as the common council of the city or the board of trustees of the town may deem just; which compensation shall be paid from the special school revenue of the city or town."

Under the provisions of this section it is made the duty of boards of trustees of incorporated towns and common councils of such cities as come under its provisions annually to elect, at their first regular meeting in June, a school trustee. While the statute directs that the election for such trustee shall be held at the first regular meeting in June, still, if for any reason it becomes necessary, the board may exercise this power at any subsequent meeting. *Sackett v. State*, 74 Ind. 486. Of course the term of the person subsequently

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elected will begin to run from the time the term of his predecessor expired, and the latter would be authorized to hold over until his successor had been elected and qualified. *Sackett v. State, supra*; *School Town of Milford v. Powner*, 126 Ind. 528; *Blakemore v. Dolan*, 50 Ind. 194.

Article 15, §4, of the State Constitution is as follows: "Every person elected or appointed to any office under this Constitution shall, before entering on the duties thereof, take an oath or affirmation to support the Constitution of this State and of the United States, and also an oath of office."

Section 7533 Burns 1894, §5519 R. S. 1881 and Horner 1897, requires that: "Every officer and every deputy, before entering on his official duties, shall take an oath to support the Constitution of the United States and of this State, and that he will faithfully discharge the duties of such office."

Section 2131 Burns 1894, §2044 R. S. 1881 and Horner 1897, provides that: "Whoever, having been elected or appointed to any office, or being the deputy of any officer so elected or appointed, performs any of the duties of such office without having taken and subscribed the oath prescribed by law, or before having given and filed the bond required of him and in the manner prescribed by law, shall be fined not more than \$1,000 nor less than \$10."

These provisions of our fundamental and statutory law clearly show that a public official is not authorized to enter upon the discharge of the duties of the office to which he may have been elected or appointed until he has taken the official oath required and given the bond provided for in the event an official bond is also required. The qualification which the law prescribes is, as a general rule, considered a condition precedent which must be complied with in order to constitute the person chosen to fill the office an officer *de jure*. Such person is not in a position to demand possession of the office to which he may have been elected or appointed, or to exercise the functions thereof, until he has

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qualified as the law exacts. 19 Am. & Eng. Ency. of Law, 440; *McVeany v. Mayor, etc.*, 80 N. Y. 185, 36 Am. Rep. 600; *People v. Taylor*, 57 Cal. 620.

The statute, under the authority of which Post and appellant were elected, expressly requires that trustees thereunder, before entering upon the discharge of the duties of the office, shall take an official oath. This apparently is the only qualification exacted to entitle the person elected to become a *de jure* member of the school board and take part in its reorganization.

This statute, as we have seen, provides that the three trustees originally chosen shall meet within five days after their election and organize, by electing one of their number as president of the board, one as secretary, and one as treasurer. Each of these, as such official, is required to give a bond as therein provided, not merely as school trustee, but to secure the faithful performance of the duties of president, secretary, or treasurer, respectively. *Koerner v. State*, 148 Ind. 158.

Within five days after each annual election of a member, this same statute, in effect, requires that the trustees, which includes the hold-over members and the one elected, shall meet and reorganize the board by electing from their number a president, secretary, and treasurer for the ensuing year, and each, as such official, is required to execute his respective bond. The evident intent and purpose of the law is that the school trustee chosen at the annual election in June shall promptly qualify as such by taking the required oath, and be ready to take his seat as a member of the board, in order that it may be reorganized within the time designated.

Where the person elected as trustee is apprised of or has notice of his election in time to qualify within such period of five days, it is his duty to do so unless he does not intend to accept the office, in which event he should notify the common council, or the board of trustees, as the case may be, of his intention not to accept, in order that it may pro-

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ceed to fill the vacancy by electing another person. The failure of the party elected as such trustee to qualify within the period designated, by taking the oath of office, in the absence of a showing that such neglect is not attributable to his own fault, will authorize the board of trustees of a town, or common council of a city, as the case may be, to assume that their appointee does not intend to accept the office, and it would be the duty of such body, under the circumstances, to proceed to fill the vacancy.

The object of the statute, requiring a person chosen to fill a public office to qualify within the prescribed time, is to compel him promptly to enter upon the discharge of his official duties after the beginning of his term; and if, without legal excuse, he neglects to do so, such neglect will constitute a ground of forfeiture, which may result in his losing the office. *State v. Johnson*, 100 Ind. 489.

It is true, as a general rule, that such statutes are construed by the courts as directory only, and not mandatory; and the mere delay in not qualifying within the prescribed time will not, as a rule, *ipso facto* forfeit the right or title to the office. *Board, etc., v. Johnson*, 124 Ind. 145, 7 L. R. A. 684; *Albaugh v. State*, 145 Ind. 356; *Mechem's Pub. Off.*, §§251, 433.

As the delay does not of itself amount to a rejection of the office, but is only a ground of forfeiture, the party elected and in default may still be permitted to qualify after the prescribed time; and if he does so, his default will be considered as waived. *Mechem's Pub. Off.*, §262. But when the delay to qualify is continued beyond the time fixed by the statute, and the authorities or body in whom is lodged by law the power to fill the vacancy have thereafter acted, and legally elected or appointed another to fill the office, the right or title of the person to the office, who was in default in not qualifying as the law exacted, is absolutely forfeited or destroyed and his attempt to qualify thereafter can not revive or restore his title. This rule is well affirmed by the

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authorities. *Smith v. Cronkhite*, 8 Ind. 134; *Johnson v. Mann*, 77 Va. 265; *State v. Johnson*, 100 Ind. 489; *Falconer v. Shores*, 37 Ark. 386; *Board, etc., v. Johnson*, 124 Ind. 145, 7 L. R. A. 684; *Ross v. People*, 78 Ill. 375; *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Mechem's Pub. Off.*, §262; *Throop on Pub. Off.*, §§427, 428.

Applying the principles heretofore asserted, it is evident, we think, that the facts established by the evidence in this case do not justify the decision of the trial court in holding that appellant had unlawfully usurped the office in question. It is true that the orderly way in which to have notified Post of his election would have been for the clerk of the town's board of trustees to have issued to him a certificate of his election. The clerk, upon the witness stand on the trial of the case, stated that he had in person notified Post of his election as school trustee the day thereafter. This, however, Post denied, but he admitted that he had been apprised or notified of his election on the day following that event, and he does not attribute his delay in qualifying for a period of over forty days after his election to the absence of notice; and we may presume, under the circumstances, that he was fully apprised of his election and of the duty which the law imposed upon him in respect to qualifying. From the evidence it appears that he was more interested in having Wright, whom he had been elected to succeed, continue to hold over than he was in being inducted into office himself. He delayed, as we have seen, for a period of time running from June 24, 1898, to August 5th, following, and then, after appellant had been elected and qualified, he suddenly became aware that he ought to take the necessary steps to qualify. This, according to the rule which we have asserted, was too late. The long continued delay to qualify, for which no legal excuse is offered, certainly justified the board in assuming that Post had rejected the office and warranted that body in filling the vacancy, as

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it did, by the election of appellant. This action of the board, as we have seen, absolutely destroyed or forfeited the title of Post to the office, under his election, and his qualification thereafter could not serve to revive or restore his former right or title.

It follows, therefore, that the court, under the facts, erred in its decision in holding that appellant had unlawfully usurped the office in controversy. The judgment is therefore reversed, and the cause ordered to be remanded to the lower court, with instructions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

OWEN ET AL. v. DRESBACK.

[No. 19,139. Filed Jan. 26, 1900. Rehearing denied March 28, 1900.]

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APPEAL AND ERROR. — *Vacation Appeal.*—*Parties Appellant.*—An appellant in a vacation appeal must join all of his co-parties or the appeal will be dismissed. *p. 394.*

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SAME.—*Record.*—*Judgment.*—*Recital.*—A recital at the beginning of a finding and judgment that the action had been dismissed as to certain parties is overcome by the statement in the record of the facts to the contrary. *pp. 394-396.*

From the Grant Circuit Court. *Appeal dismissed.*

A. E. Steele, J. A. Kersey, Knight & Brown, R. O. Hawkins and H. E. Smith, for appellants.

W. D. Lett, W. E. Haisley and A. DeWolf, for appellee.

BAKER, J.—Owen began this suit against the Chicago, Indiana and Eastern Railway Company to enforce a lien upon its property, and made Dresback, Shultz, Shultz and Shultz, the Illinois Trust and Savings Bank, trustee, and others, parties defendant to answer as to their interests. Dresback filed a cross-complaint to enforce a lien against the lands of the railway company, alleging therein that the Illinois Trust and Savings Bank as trustee, Charles S. Owen, Charles Wilhour, William W. Shultz, James M. Shultz, Alexander

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Shultz, Quile Horton, Samuel L. Howard and J. S. McNair severally claimed to have liens upon the railroad and that his lien was prior and superior to any claim or interest of any of them. Shultz, Shultz and Shultz, and the other parties filed answers to Dresback's cross-complaint. The complaint and the cross-complaints of the other parties were dismissed, and the cause was determined upon the cross-complaint of Dresback and the answers thereto. After the submission and while the court had the case under advisement, Shultz, Shultz and Shultz filed a petition showing to the court that they were partners doing business under the firm name of Shultz Brothers, and that in January, 1897, Charles L. Boyd had been appointed and had qualified as receiver for the firm, and asked that he be substituted as a party in the cause in the place of the partners. Upon the consent of the other parties being filed, the court ordered that receiver Boyd be declared a party defendant and cross-complainant in the place of Shultz, Shultz and Shultz. The court found that the claim of Dresback was a lien upon the railway company's land, and judgment was rendered directing the lands to be sold by the sheriff "and the proceeds applied to the payment of cross-complainant Lewis C. Dresback's claim and costs, and the balance after paying claim and costs be paid to the clerk of this court for the use of the party lawfully authorized to receive the same". Separate motions of the Illinois Trust and Savings Bank, trustee, the Chicago, Indiana and Eastern Railway Company and Charles S. Owen for a new trial were overruled, and these parties prayed an appeal. But a term-time appeal was not perfected. The record discloses that the judgment was rendered June 26, 1897; motion for a new trial overruled June 27, 1897; no bond filed; notice of appeal to all parties, including Charles L. Boyd, receiver, served December 30, 1897; transcript filed in this court February 16, 1898; Charles L. Boyd or Charles L. Boyd, receiver, not named in the assignment of errors.

Appellee contends that the appeal must be dismissed. By

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the appointment of the receiver for the partnership of Shultz Brothers the affairs of the firm were taken out of the hands of the partners. The receiver, on being substituted as a party in this cause, represented the interests of the firm and Shultz Brothers ceased to be parties. The judgment of the court that appellee's claim was a lien upon the lands of the railway company and that the lands be sold and appellee's claim and costs be first paid and the balance be brought into court for those authorized to receive it, was necessarily a judgment that appellee's lien was superior to all others and was a judgment against the receiver from which he had a right to appeal. It bound the receiver of Shultz Brothers in the same manner and to the same extent it bound Owen and all other parties who denied the paramountcy of appellee's lien. In *McKee v. Root*, 153 Ind. 314, this court said: "It is settled law that, to give this court jurisdiction of this appeal, the same being a vacation, and not a term-time appeal, appellants should have made all their co-parties to the judgment co-appellants with them in this court, and for their failure to do so the appeal must be dismissed." This principle is supported by the following authorities: *Brown v. Trexler*, 132 Ind. 106; *Gourley v. Embree*, 137 Ind. 82; *Gregory v. Smith*, 139 Ind. 48; *State v. Hodgin*, 139 Ind. 498; *Benbow v. Garrard*, 139 Ind. 571; *Wood v. Clites*, 140 Ind. 472; *Inman v. Vogel*, 141 Ind. 138; *Vordermark v. Wilkinson*, 142 Ind. 142; *Denke-Walter v. Loeper*, 142 Ind. 657; *Lee v. Mozingo*, 143 Ind. 667; *Shuman v. Collis*, 144 Ind. 333; *Midland R. Co. v. St. Clair*, 144 Ind. 363; *Roach v. Baker*, 145 Ind. 330; *Stults v. Gibler*, 146 Ind. 501; *Abshire v. Williamson*, 149 Ind. 248; *Crist v. Wayne, etc., Assn.*, 151 Ind. 245; *Michigan, etc., Ins. Co. v. Frankel*, 151 Ind. 534; *Ewbank's Manual*, §146.

Appeal dismissed.

ON PETITION FOR REHEARING.

BAKER, J.—On behalf of the railway company, counsel urge that the dismissal was erroneous. Counsel admit that

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on the statement of the case as made in the opinion this court had no jurisdiction of the appeal. They contend, however, that the statement is incorrect and that the record discloses that the railway company was the sole defendant to the judgment in favor of Dresback. If such were the record, counsel who filed the transcript were in error in making Owen and the Illinois Trust and Savings Bank parties appellant; and they recognize the logic of their position by omitting those appellants from this petition. The contention that the court's statement is wrong is based on a recital at the beginning of the finding and judgment: "Charles S. Owen v. Chicago, Indiana and Eastern Railway Company et al., No. 7528. Judgment on Dresback's claim. Come now Lewis C. Dresback by his attorney, Austin DeWolf, and the Chicago, Indiana and Eastern Railway Company by John A. Kersey, its attorney, *the said action having been dismissed as to all other parties of record without prejudice to the said Lewis C. Dresback*, and the court, having heard the evidence in the case and being sufficiently advised in the premises, finds," etc. Then follows the finding and judgment as stated in the opinion. Counsel insist that the court must have overlooked the italicized recital. After a careful consideration of every word in the record, a condensed statement was given, in the opinion, of the facts on which the question of jurisdiction rests. There are two reasons why the recital is ineffective to dismiss the cross-complaint of Dresback as to all defendants thereto except the railway company, that seemed so obvious that it was not thought necessary to set forth the record in greater detail. In the first place, the recital, under the caption of Owen against the railway company and others, does not recite that anything had been dismissed except Owen's action. In the second place, even if the recital was that Dresback had dismissed his cross-action as to all defendants thereto except the railway company, the recital would be ineffective unless the record were otherwise silent as to what the recited dismissal actually was; but, if the record

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affirmatively disclosed what was actually dismissed, the record of what was done would overcome any later recital of what had been done. *Hawkins v. Hawkins*, 28 Ind. 66; *Coan v. Clow*, 83 Ind. 417. The issues made upon Owen's complaint and upon all the cross-complaints were together submitted to the court for trial. After the evidence upon all these issues had been heard and the court had taken its decision under advisement, Owen dismissed his action and all the cross-complainants except Dresback dismissed their cross-actions. But they certainly did not thereby dismiss themselves out of court as defendants to Dresback's cross-action. Dresback did not dismiss as to any of them; and none withdrew his answer to Dresback's cross-complaint and filed a disclaimer. So the record remains as stated that "the cause was determined upon the cross-complaint of Dresback and the answers thereto"; and counsel correctly understood the record when they appealed on behalf of Owen and the Illinois Trust and Savings Bank.

Rehearing denied.

DOREN ET AL. v. LUPTON.

[No. 18,745. Filed March 29, 1900.]

154	396
155	574

154	396
166	333

QUIETING TITLE.—Tax Title.—Title acquired by a tax deed is not destroyed by the grantee accepting a deed to the property from one claiming a life interest therein. *pp. 397, 398.*

SAME.—Claim For Improvements.—In the trial of an action to quiet title to real estate, evidence as to the value of the land and improvements made by defendant was properly excluded where no claim for improvements was made by the pleadings. *p. 399.*

SAME.—Evidence.—Taxes.—Evidence that the rental value of the real estate exceeded the taxes assessed against it was improperly admitted in the trial of an action to quiet title to real estate, where defendant held title under a tax deed and a deed from one claiming a life interest in the real estate, and had not filed an affirmative pleading under the occupying claimant's act to recover for the improvements and taxes. *pp. 399, 400.*

From the Jay Circuit Court. *Reversed.*

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F. H. Snyder and G. W. Bergman, for appellants.
J. J. M. LaFollette, for appellee.

BAKER, J.—Complaint by appellee in two paragraphs to quiet title. Answer in general denial. Trial by the court and judgment for appellee. Motion for a new trial overruled. The error assigned is that the court erred in overruling the motion for a new trial.

The first paragraph is the ordinary complaint to quiet title. In the second paragraph the plaintiff pleads a specific title, showing that the land in controversy had been conveyed on September 25, 1882, by William H. Rush, the then owner, to Levi and Margaret Hubbard for life with remainder to William H. Hubbard; that William H. Hubbard conveyed the land to plaintiff in October, 1892; that after the death of Margaret Hubbard, Levi Hubbard had conveyed his life-estate in the land to the appellant Emory E. Doren, who took possession and still occupies the land and refuses appellee his rights therein; that Doren had wrongfully bought the land at tax sale and had received a deed therefor, and that the tax sale and deed were illegal and void; that Levi Hubbard is now dead; that appellant Emma Doren is the wife of Emory Doren and is made a party defendant on that account.

The first reason assigned for a new trial and argued by counsel is that the decision of the court is contrary to law. The only evidence introduced by appellee in opening his case was the deed from Rush to the Hubbards; the deed from William H. Hubbard to appellee; that Levi and Margaret Hubbard were dead; and that appellants were in possession claiming some title. On the defense appellants introduced in evidence a tax-title deed from the auditor of Jay county to appellant Emory E. Doren, dated February 24, 1890, which is regular on its face and purports to convey the fee-simple title to the land in controversy to Doren. On rebuttal appellee introduced in evidence the deed of Levi Hub-

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bard to Emory E. Doren, dated May 24, 1890, and also proved the rental value of the real estate. Appellee contends that by the tax sale and deed Doren acquired simply a lien and that when he afterwards became the owner of the life-estate and took possession of the land, receiving the benefits therefrom, he was in duty bound to pay the lien and it became merged in the life-estate. Though this might be true on the assumption that the tax sale and deed gave the purchaser a mere lien, appellee did not prove or attempt to prove that the sale was irregular, or that the deed was invalid and did not convey title; that there had not been a demand on the life tenant for the taxes; that the life tenant had personal property out of which the taxes could have been collected; that there had been no demand on the owner of the fee, or, that the owner of the fee had sufficient personal property in the county to pay the tax; or that the statute had not been strictly complied with in making the sale. At the time of the sale and when the tax deed was executed Doren had the legal right to purchase the title. He was not then the owner of the life-estate and had no interest in the land. Appellants had introduced the tax-title deed in evidence as a defense. The tax law of 1881 (§6480 R. S. 1881), in force at the time of the sale and the making of the deed, and the law of 1891 (§8624 Burns 1894, §6473 Horner 1897), in force when the trial was had, provided that "Such deed shall be *prima facie* evidence of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, and *prima facie* evidence of a good and valid title in fee-simple in the grantee of said deed". *Richard v. Carrie*, 145 Ind. 49. The fee, evidenced by the tax deed of February, 1890, was not lost or destroyed by securing possession from an occupant who claimed a life-tenancy. Since the deed of February, 1890, was *prima facie* a complete defense to appellee's action, and since the deed of May, 1890, was not sufficient to rebut the *prima facie* defense, the decision of the court in finding that

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appellee was entitled to have his title quieted was contrary to law.

It is also contended by appellants that the court erred in excluding evidence offered as to the value of the land and of the improvements made by appellants while in possession. The right to recover for the value of improvements is purely statutory, and appellants could exercise that right only by conforming to the occupying claimant law. *Ches-round v. Cunningham*, 3 Blackf. 82; *Westerfield v. Williams*, 59 Ind. 221. The statute (§1074 R. S. 1881 and *Horner* 1897, §1087 *Burns* 1894) provides that "When an occupant of land has color of title thereto, and in good faith has made valuable improvements thereon, and is afterward, in the proper action, found not to be the rightful owner thereof, no execution shall issue to put the plaintiff in possession of the property after filing the complaint hereinafter mentioned, until the provisions of this act are complied with". The following section reads: "The complaint must set forth the grounds on which the defendant seeks relief, stating, among other things, as accurately as practicable, the value of the improvements on the lands as well as the value of the lands aside from the improvements." To recover, the claimant need not act until he is "found not to be the rightful owner"; but he may file his complaint or cross-complaint in the main action, under §1085 R. S. 1881 and *Horner* 1897, §1098 *Burns* 1894, setting forth the sale and title under it, the particular kind and character of improvements, etc., as contemplated in the act. *Goodell v. Starr*, 127 Ind. 198. As appellants had not filed a claim for improvements, there was no issue under which the offered evidence was competent.

Appellants also urge that the court erred in permitting appellee to prove, in rebuttal, the rental value of the real estate. Though this evidence might have been competent, on the assumption that Doren acquired only a lien by the tax-title deed and not a title in fee, to show that the rental

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value exceeded the taxes and assessments and that therefore it was the duty of the owner of the life-estate to pay them and protect the interest of the remainder man (*Clark v. Middlesworth*, 82 Ind. 240), yet, since no evidence was introduced to show that the tax-title deed created only a lien, and appellants had not filed an affirmative pleading under the occupying claimants' act to recover for the improvements and taxes, and were not asking to recover the taxes that had been paid as occupants or tenants under §8596 Burns 1894, §6445 Horner 1897, the evidence was incompetent and should not have been admitted.

Judgment reversed with directions to grant a new trial.

JONES v. MAYNE ET AL.

[No. 18,927. Filed Jan. 4, 1900. Rehearing denied March 29, 1900.]

APPEAL AND ERROR.—*Waiver.*—Assignments of error which are not discussed are waived. pp. 401, 402.

SAME.—*Record.*—No question is presented upon an assignment of error based upon the action of the court in overruling a demurrer to the complaint, where the demurrer is not copied into the transcript. p. 402.

SAME.—*Motion to Modify Judgment.*—Available error cannot be predicated upon the action of the court in overruling a motion to modify a judgment when the judgment followed the conclusions of law as stated. p. 402.

SAME.—*Conclusions of Law.*—*Joint Assignment of Error.*—An assignment of error assailing all of the conclusions of law jointly will not be considered on appeal if any one of the conclusions is correct. p. 402.

SAME.—*Joint Assignment of Error.*—*Failure to Discuss.*—An appellant does not waive an assignment of error assailing several conclusions of law jointly by failing to discuss each conclusion of law separately in his brief, where he states certain propositions, supported by argument and citation of authorities, which if true and applicable, show that no conclusions could be properly stated in favor of the appellee upon the facts found. p. 402.

SAME.—*Motions.*—*Practice.*—A party does not waive his exception to the conclusions of law by subsequently moving the court to add to the finding certain facts which were in evidence. pp. 402, 403.

154	400
155	851
156	509
156	535

154	400
158	195

154	400
159	241
159	242

154	400
160	91
160	586

154	400
163	29

154	400
165	254

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COMPROMISE AND SETTLEMENT.—Judgments.—Fraud.—A judgment on a complaint by heirs and distributees setting aside for fraud and misrepresentation an order of court authorizing the administrator to assign an insurance policy in favor of the estate, upon the life of another, in settlement of a suit on a claim pending an appeal from a judgment in favor of the estate, was erroneous, where there was no offer to restore the funds of the estate and place the claimant in the same position he occupied in reference to his appeal. *pp. 403-410.*

From the Wabash Circuit Court. *Reversed.*

J. C. Branyan, M. L. Spencer, W. A. Branyan and J. S. Branyan, for appellant.

J. B. Kenner, U. S. Lesh and S. M. Saylor, for appellees.

BAKER, J.—Two of appellees, Laura Mayne and Lucy Purviance, children and heirs at law of Joseph Purviance, deceased, began this suit in the Huntington Circuit Court against appellant and the administrator and the widow and remaining heirs of decedent to set aside an order of the Huntington Circuit Court, made in the course of administration upon the estate, authorizing the administrator to assign an insurance policy upon the life of one Wilhelm, owned by the estate, to appellant in settlement of an alleged claim of appellant against the estate, and to cancel the assignment made in pursuance of such order. The widow and the other heirs confessed the complaint and filed a cross-complaint in which they sought the same relief. After the issues were joined, the venue was changed to the Wabash Circuit Court. The court, on proper request, made a special finding of facts and stated conclusions of law thereon. Judgment was rendered in favor of plaintiffs and cross-complainants against appellant and the administrator. The errors assigned and not waived are: (1) That appellant's demurrer to the complaint was erroneously overruled; (2) that the cross-complaint does not state facts sufficient to constitute a cause of action against appellant; (3) that the conclusions of law are incorrect; (8) that appellant's motion to modify the judgment was improperly overruled. The fourth, fifth,

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sixth, and seventh assignments, concerning the rulings on appellant's motions for a *venire de novo*, for a new trial, for a new trial upon the cross-complaint, and in arrest of judgment, are waived by appellant's failure to discuss them in his brief.

As the demurrer to the complaint is not copied into the transcript, no question is presented by the first assignment. What the grounds of demurrer were, or whether any ground was properly stated, does not appear. The ruling, therefore, must be presumed to be correct. *Aydelott v. Collings*, 144 Ind. 602.

The judgment strictly follows the conclusions of law as stated. The eighth assignment, therefore, presents no question. *Anglemyer v. Board, etc.*, 153 Ind. 217.

The sufficiency of the cross-complaint is questioned, for the first time, by the second assignment. Inasmuch as the cross-complaint comes here with all the curative effects of the finding and judgment, the question presented need not be considered separately, if the finding of facts does not warrant the conclusions of law.

The third assignment assails all of the conclusions of law jointly. If any one of the six conclusions is correct, appellant must fail. *Saunders v. Montgomery*, 143 Ind. 185; *Ewbank's Manual*, §135.

Appellees claim that appellant has waived this assignment by failure to discuss each conclusion of law separately in his brief. Appellant, in reference to this assignment, has stated in his brief certain propositions, supported by argument and citation of authorities, which, if true and applicable, show that on the facts found no conclusion of law could be properly stated in favor of appellees and that the proper conclusion would have required a judgment for appellant. Under such circumstances it cannot properly be said that appellant waived the error by failure to present it to this court.

Appellees urge further that appellant waived his excep-

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tion to the conclusions of law, which he reserved immediately upon the announcement thereof, by subsequently moving the court to add to the finding certain facts which were in evidence but presumably overlooked by the court. The court added the facts as requested. The record shows that the finding of facts and conclusions of law were filed by the court at one time. Appellant was required to except immediately. If he had allowed other proceedings in the cause to intervene, his subsequent exception would have been too late. *Roeder v. Keller*, 135 Ind. 692. A court, after filing the finding of facts, may amend the finding, at any time before final judgment and during the period within which a motion for a new trial may rightfully be filed, by supplying omissions and correcting inadvertent mistakes, so that the finding shall exhibit all of the material facts that the court believes to have been proved. And this may be done by the court of its own motion or at the suggestion of either party. *Thompson v. Connecticut, etc., Ins. Co.*, 139 Ind. 325; *Royse v. Bourne*, 149 Ind. 187. There is no rule of practice recognizing the right of parties to file, as part of the proceedings in a cause, a motion to modify the special finding. *Windfall, etc., Co. v. Terwilliger*, 152 Ind. 364. No matter how the court's attention is called to the omissions or misstatements, the amendment is the court's own. If a party should file such a motion, whether the court struck it from the files or let it stand, whether the court acted or refused to act upon it as a suggestion made in or out of court, no error could be predicated upon the court's action. If either party thinks the finding as finally made by the court is deficient or incorrect, his remedy is by motion for a *venire de novo* or for a new trial. And if the court does amend the finding, the amendment relates to the time of filing the finding; and if the court lets the conclusions of law remain as filed, as he did in this case, he does so subject to the exceptions already taken thereto.

The finding in substance is as follows: Joseph Purviance

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died intestate, on November 29, 1885, in Huntington county, leaving an estate therein. He left surviving him the plaintiffs and cross-complainants as his heirs at law. Plaintiffs were then eight and ten years old respectively. In December, 1885, William Purviance was appointed administrator by the Huntington Circuit Court and qualified. On April 18, 1887, appellant filed a claim against the estate for \$1,525.98 and interest from July, 1873. The administrator refused to allow the claim. A trial resulted in a judgment in favor of appellant. On appeal, the judgment was reversed by this court and a new trial ordered. At the second trial February 4, 1890, the court entered judgment for the administrator upon a special verdict. Appellant at once prayed an appeal which was granted, and ten days time was given in which to file an appeal bond and bills of exceptions. Immediately after the rendition of the judgment, the attorney of the administrator presented to the court the following petition: "Huntington Circuit Court, January Term, 1890. John D. Jones v. Wm. Purviance, Adm. To the Honorable Judge of the Huntington Circuit Court: The undersigned administrator would respectfully represent that there exists a claim of the said John D. Jones against said estate that threatens continued litigation and prevents the settlement of the estate and the payment of debts which are drawing interest; and the estate is the owner of a certain policy of insurance on the life of James Wilhelm of the city of Huntington, on which annual premiums or dues are still pending, and no one of the heirs is able or willing to pay the accruing dues; therefore your petitioner believes that said policy would be lost to said estate and that it is to the interest of said estate that your petitioner be allowed to assign said policy to said Jones in full of said claim so pending, and upon the following terms, that said Jones pay all dues owing and accruing on said policy and when he realizes on said policy, pay to the widow, if living, and if the widow should not be living, to the children of said Joseph Purviance, the

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net amount of said policy less the sum of \$2,500 and less also the amount said Jones may have to pay to keep said policy alive. Wm. Purviance, administrator." The attorneys of the appellant indorsed on the petition his acceptance of the proposed settlement. The petition was not verified. It was drawn up and signed by the attorney who represented the administrator in the lawsuit. The administrator did not know the contents of the petition, and had not authorized the execution of the particular instrument, but had directed his attorney to settle with appellant upon any terms that the court would approve. Upon presentation of the petition and the acceptance of the terms of the proposed settlement, the court made and entered the following order: "And now, pending said proceedings for an appeal of this cause, said administrator asks leave of the court to compromise and adjust all differences between the estate and said plaintiff and files his petition therefor in these words: (Here insert.) And the court, being advised in the premises, sustains said petition and hereby authorizes and directs said administrator to compromise and adjust said claim with said plaintiff and to assign and transfer to said John D. Jones the said policy of insurance, mentioned in said petition, upon the terms and conditions therein set forth, in full of all claims and demands of said John D. Jones upon or against said estate." In pursuance of this order, the administrator indorsed the policy to appellant, who thereupon abandoned his appeal. The policy had never been inventoried or appraised by the administrator. It was a non-forfeiting life policy issued by the Connecticut Mutual Life Insurance Company on February 15, 1867, upon the life of James Wilhelm of Huntington, Indiana, in the sum of \$3,000. It was made payable to "the assured, his executors, administrators, or assigns". It provided for the payment of annual premiums for ten years from date of issue. It prohibited, on pain of forfeiture, the assured from traveling by land or sea beyond the settled limits of the United States, from

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visiting territory south of the thirty-sixth degree of north latitude or west of the twenty-first meridian of longitude west of Washington, from engaging in various employments, etc. On August 19, 1868, for a valuable consideration, Wilhelm indorsed the policy to Joseph Purviance, who died the owner thereof. At the time of the compromise between appellant and the estate the premiums had been fully paid except \$140, which had been settled by note. By the terms of the policy, it was not necessary that the note should be paid before Wilhelm's death to prevent a forfeiture. Some of the statements in the petition were false: There were no annual premiums or dues pending thereon to be paid; the heirs were able and willing to pay all sums that were due on the policy; the failure to pay the note above mentioned would not result in a loss of the policy to the estate. Only one of the heirs had been consulted about making the assignment to appellant. None had been asked to make any payments on the policy. In acting on the petition, the court believed that the statements therein contained were true, did not know that the policy had not been inventoried or appraised, was ignorant of the fact that the administrator had not signed the petition, and was under a misapprehension of the facts concerning the policy and the terms and value thereof. Neither the administrator, nor his attorney, nor the appellant, nor his attorneys, intentionally attempted to perpetrate a fraud upon the court. None of the heirs had any knowledge or notice of the petition and order at the time the policy was assigned to appellant. After appellant abandoned his appeal, the judgment against him remained in force, unappealed from. There was no consideration for the assignment of the policy by the administrator to appellant. At the time, appellant had no claim pending against the estate. Wilhelm was then about seventy-one years old, had an expectancy of about eight years, the insurance company was solvent, and the policy was very valuable. Appellant never paid anything to the insurance company to keep

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the policy alive. On March 13, 1890, in vacation, the administrator filed in the clerk's office his final report. Hearing was set for April 7, 1890, and two weeks' notice was given by publication and posting. No indorsement of the filing or of the setting for hearing was made upon the report. On April 11, 1890, the administrator filed what purported to be an amended final report. In fact the original report was not amended. The only changes made consisted in indorsing upon the report the words "Amended Final Report" and "Filed, April 11, 1890. John S. Glenn, Clerk". No further or additional notice was given. On April 11, 1890, the report was examined and approved, the estate declared settled, and the administrator discharged. There was found to be in the hands of the administrator \$1,000.04 for distribution. This sum was paid to the clerk, and distributed to the heirs within ten days. The policy was not referred to nor accounted for in the final report, nor in any previous report. Wilhelm died in December, 1896. Thereupon appellant made proofs of death, etc. The company did not pay the claim at maturity. Appellant sued the company in the Huntington Circuit Court, and made all of the heirs of Joseph Purviance parties defendant. The company appeared and paid into court \$2,798, which was the amount of the policy less the premium note and interest, for the use of the party that the court might find entitled to it. That action is yet pending. At the January, 1898, term of the Huntington Circuit Court, on the complaint of the plaintiffs in this suit, to which complaint the administrator and appellant were made defendants, the order approving the final report was set aside and the estate was opened up. This judgment is in force, unappealed from, and the estate is now pending unsettled. The order of the court authorizing the assignment of the policy was obtained through misrepresentation and under a misapprehension of the facts by the court, and should be set aside. The assignment of the policy to appellant was wrongful and void and without legal

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authority on the part of the administrator, and should be set aside. The policy is the property of the estate.

Upon this finding, the court entered the following conclusions of law: (1) That the order approving the final report should be set aside as to all the parties herein. (2) That the order approving the final report has been set aside and the estate reopened. (3) That the order authorizing the assignment should be set aside. (4) That appellant took no title by the assignment, and that the policy remained the property of the estate. (5) That the assignment of the policy to appellant was without consideration. (6) That the appellant and the administrator pay costs.

Appellant had the right to appeal from the judgment against him on his claim against the estate. It was a valuable right. Just as soon as the judgment was entered, he was found taking steps to exercise that right. The attorney of the administrator was willing to settle the litigation at this point. He knew that appellant had recovered a large judgment at the first trial, and that the judgment was reversed for a defect in the special finding. *Purviance v. Jones*, 120 Ind. 162. He knew that if appellant ultimately recovered, the \$1,000 then on hand to distribute to the heirs would not pay one-third of the judgment. Appellant, on his side, knew that his appeal might not be successful, or it is not presumable that he would have taken in settlement a thing of such uncertain value as a policy that might be rendered wholly worthless by the assured's doing some forbidden act. Appellant agreed to give up his right of appeal in consideration of receiving the decedent's title to the policy. Appellant forebore to take his appeal, and he thereby paid a valuable consideration. *Wray v. Chandler*, 64 Ind. 146; 6 Am. & Eng. Ency. of Law (2nd ed.), 747; *Russell v. Daniels*, 5 Col. App. 224, 37 Pac. 726; *Matthews v. Merrick*, 4 Md. Ch. 364; *Read v. French*, 28 N. Y. 286. "The prevention of litigation is not only a sufficient but a highly favored consideration." *Bement v. May*, 135 Ind.

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664, and cases cited on page 669. For this consideration, the administrator assigned the policy to appellant. This is not a case wherein the administrator undertakes to act for himself under his statutory authority. In such a case, he must comply strictly with the statute—the source of his authority. *Ramey v. McCain*, 51 Ind. 496; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Citizens St. R. Co. v. Robbins*, 128 Ind. 449, 12 L. R. A. 498. Here, the court in which the trust was being administered approved the settlement of the pending litigation and directed this particular transfer to be made. The theory of appellees' case is that, without the order of the court and a compliance therewith, the transfer would be void for failure of the administrator to follow the statutory mandates in reference to the disposition of personalty; that the transfer, in pursuance of the order of the court, would be valid except for the fraud in procuring the order; and that the order is voidable on account of the fraud. So, the central point is appellees' appeal to a court of equity to cancel the order for fraud. For this reason, the contention of appellees that appellant is not shown to have had an insurable interest in the life of Wilhelm presents no question. It is neither averred nor found that he did not have an insurable interest; and equitable intervention is sought on the basis that appellant obtained a colorable title that may be avoided. Now, in what attitude did appellees come into a court of equity? They were distributees. There was \$1,000 ready to distribute as soon as appellant's lawsuit was out of the way. The administrator represented them in that litigation. By the compromise, he obtained for them a valuable consideration from appellant which they retain and purpose to keep. While ratifying the act of the administrator in securing what he did from appellant, they repudiate his act in paying appellant therefor. In asking equity, they should have offered to do equity. *Jones v. Ewing*, 107 Ind. 313; *Balue v. Taylor*, 136 Ind. 368; *Norris v. Scott*, 6 Ind. App. 18. In asking

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that the order authorizing the assignment of the policy be canceled, they should have offered that the compromise (which was part of the order) be annulled, that the judgment and prayer for appeal (on which the order was based) be set aside and reentered as of the date of any final decree in their favor canceling the order for assignment, and that the funds of the estate be restored. It is unnecessary, therefore, to consider whether or not the facts found make out a case in which the order of the court should be set aside for fraud or mistakes. On this finding, no conclusion of law, in any form, could be drawn properly in favor of appellees. The only conclusion, legally deducible from the finding, was that the plaintiffs and cross-complainants are entitled to no relief.

Judgment reversed, with directions to restate the conclusions of law and to enter judgment for appellant.

CARSKADDON ET AL. v. PINE ET AL.

[No. 18,782. Filed March 30, 1900.]

BILLS AND NOTES.—*Action by Assignee.*—*Complaint.*—*Allegation as to Assignment.*—An allegation in a complaint on a promissory note that the note was assigned by the payee to plaintiff, was not equivalent to an allegation that the payee assigned the note by indorsement in writing. *pp. 411, 412.*

SAME.—*Action by Assignee.*—The payee of a promissory note must be made a defendant in an action on the note by an assignee thereof where it is not alleged that the payee assigned the note to plaintiff by indorsement in writing. *pp. 411, 412.*

APPEAL AND ERROR.—*Defect of Parties.*—*Waiver.*—A defect of parties appearing on the face of a complaint which is not taken advantage of by demurrer in the court below is waived. *p. 412.*

SAME.—*Defect of Parties.*—An assignment of error on appeal that the complaint does not state facts sufficient to constitute a cause of action presents no question concerning a defect of parties plaintiff or defendant. *p. 412.*

SAME.—*Bill of Exceptions.*—A bill of exceptions purporting to contain the evidence presented to and signed by the judge in vacation is not a part of the record, where it is not shown by order-book entry contained in the transcript that time was given to present a bill of exceptions. *p. 412.*

154	410
160	118
154	410
167	590

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From the St. Joseph Circuit Court. *Affirmed.*

Stuart McKibben, for appellants.

A. L. Brick and *F. H. Dunnahoo*, for appellees.

MONKS, J.—Appellee, Pine, sued appellants, Carskaddon and wife, to foreclose a mortgage on real estate, and to recover a personal judgment against Carskaddon on the promissory notes secured thereby. The cause was tried by the court, a special finding of facts made, and conclusions of law stated thereon against appellants, and over a motion for a new trial a judgment on said note and decree foreclosing said mortgage was rendered.

The errors assigned and not waived are: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling the motion for a new trial.

The notes and mortgage sued upon were executed to Hester Baramore, and appellants insist that the complaint is fatally defective because the manner in which the notes were assigned was not alleged. It is alleged in the complaint that after the execution of said notes the payee "assigned said notes to Leighton Pine, plaintiff herein, and that he is now the owner of the same."

Section 277 Burns 1894, §276 R. S. 1881 and Horner 1897, provides that "When an action is brought by the assignee of a claim arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant, to answer as to the assignment or his interest in the subject of the action."

The allegation that the notes were assigned by the payee to appellee Pine is not equivalent to an allegation that the payee "assigned said notes by indorsement in writing", or that the payee "indorsed said notes to said appellee." As it was not alleged in the complaint that said notes were assigned by indorsement by the payee thereof to appellee Pine, said section required that the payee be made a defendant to said

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action. Woollen's Tr. Proc. §§597, 603; *Eichelberger v. Old Nat. Bank*, 103 Ind. 401; *Gordon v. Carter*, 79 Ind. 386; *Reed v. Finton*, 63 Ind. 288; *Reed v. Garr*, 59 Ind. 299; *Clough v. Thomas*, 53 Ind. 24; *Keller v. Williams*, 49 Ind. 504; *Nelson v. Johnson*, 18 Ind. 329.

The defect of parties appearing on the face of the complaint and not having been taken advantage of by demurrer in the court below, is waived. Section 346 Burns 1894, §343 R. S. 1881 and Horner 1897. 1 Woollen's Tr. Proc. §§597, 603, 1632; *Clough v. Thomas*, 53 Ind. 24, 26; *Shirts v. Irons*, 54 Ind. 13; *Bray v. Black*, 57 Ind. 417; *Groves v. Ruby*, 24 Ind. 418, and cases cited; *Strong v. Downing*, 34 Ind. 300; Thornton's Ind. Pr. Code, §276, and note 1.

A demurrer to a complaint for want of facts, or an assignment of error in this court that the complaint does not state facts sufficient to constitute a cause of action, presents no question concerning a defect of parties plaintiff or defendant. *Strong v. Downing*, *supra*; *Shane v. Lowry*, 48 Ind. 205; *Bray v. Black*, 57 Ind. 417; *Browning v. Smith*, 139 Ind. 280, 290, 291; 1 Woollen's Tr. Proc., §§603, 1632, and cases cited.

The questions presented by the motion for a new trial depend for their determination upon the evidence which appellee Pine insists is not a part of the record. The bill of exceptions, which purports to contain the evidence, was presented to and signed by the judge in vacation, and was afterwards filed in the clerk's office. As it is not shown by any order-book entry contained in the transcript that time was given to present a bill of exceptions, the same is not a part of the record. Ewbank's Manual §33, p. 46; *Camp-ton v. State*, 140 Ind. 442, 445; *Johnson v. Ballard*, 148 Ind. 181, 182, 183, and cases cited; *Hancher v. Stephenson*, 147 Ind. 498; *Robards v. State*, 152 Ind. 294.

Finding no available error in the record judgment is affirmed.

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BELL ET AL. v. SHAFFER ET AL.

[No. 18,698. Filed Feb. 15, 1900. Rehearing denied March 30, 1900.]

154 413
155 364

EXECUTORS AND ADMINISTRATORS.—Sales of Real Estate.—Decedents' Estates.—An administrator procured an order of court directing the sale of the undivided two-thirds part in value of certain described real estate, being exclusive of the widow's interest, and by virtue of such order sold the real estate at public auction. Two months thereafter he filed an amended petition, which the court permitted to be filed as of date of the original petition, alleging that the widow was a childless second wife. On the same day the administrator reported the sale of the real estate, and the court confirmed the same, and ordered that the administrator settle with the widow and allow her a fair compensation for her interest in the property, and that her interest therein be "exterminated" before the purchaser be required to pay all of the purchase money, and the administrator afterward reported a receipt from the widow stating that the sum so paid was in full of her dower in the real estate. *Held*, that the action on the amended petition was illegal and void, and whatever title was acquired by the purchaser was obtained under the first order. pp. 414-423.

154 418
161 67

SAME.—Sales of Real Estate.—Childless Second Wife.—Decedents' Estates.—The court of common pleas had no jurisdiction, under R. S. 1852, to order the sale of more than two-thirds of a decedent's real estate for the payment of the claims of general creditors, where the decedent left surviving him a childless second or subsequent wife. p. 422.

SAME.—Sales of Real Estate.—Childless Second Wife.—Decedents' Estates.—Children by a former marriage have no present estate in the interest of a childless second or subsequent wife in the real estate of their father, and they cannot object or defend against the sale thereof for the payment of debts. p. 423.

LIMITATION OF ACTIONS.—Decedents' Estates.—Childless Second Wife.—Since the title of the children by a former marriage to the interest of a childless second or subsequent wife in the real estate of their father does not vest until her death, their right to maintain an action for the recovery thereof is not barred by the statute of limitations previous to her death. p. 424.

PARTITION.—Attorney's Fees.—Section 1223 Burns 1894 providing for the taxing of attorney's fees in a partition proceeding against all of the parties is not mandatory, but such taxation is to be awarded in such proportions against each of the parties as the court may determine. pp. 424, 425.

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From the Marion Superior Court. *Affirmed.*

J. W. Kern and *T. L. Sullivan*, for appellants.

F. E. Gavin, *C. F. Coffin*, *T. P. Davis* and *W. Booth*, for appellees.

DOWLING, J.—Suit for partition by appellees against appellants, the former claiming to be the owners in fee of the undivided one-third of lot number forty-four, in Sorin's subdivision, etc., in the city of Indianapolis, and State of Indiana. The defendants answered in four paragraphs, the first being a general denial, and the second, third, and fourth setting up the defenses of an estoppel by matter of record, by matter *in pais*, and the statutes of limitations of five, fifteen, and twenty years. Reply in denial. The appellant, Joseph E. Bell, filed his separate cross-complaint against the appellees, asserting title to the whole of the lot described in the complaint, and asking to have the same quieted. Answer in denial.

At the request of the parties, the court made a special finding of facts, with its conclusions of law thereon. Appellants separately excepted to each conclusion of law. They also filed their separate motions for a *venire de novo*, and for a new trial. These motions were overruled, and judgment was rendered on the finding in favor of appellees. Errors are assigned upon the several conclusions of law, and upon the rulings of the court on the motions for a *venire de novo*, and a new trial.

The facts found by the court may be summarized as follows: One Charles O. Fry, an inhabitant of Hamilton county, Indiana, died intestate, in March, 1868, seized in fee simple of lot number forty-four in Sorin's subdivision of out lots numbers 175 and 176, in the city of Indianapolis. He left surviving him his widow, Elizabeth Fry, a childless third wife, and seven children by former marriages, viz., Melissa Shaffer, William Fry, Arena Wolf, Isaac Fry, Albert Fry, Oliver Fry and Abraham L. Fry.

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Afterwards, one Andrew McKinsey was appointed by the court of common pleas, of Hamilton county, administrator of the estate of the said Charles O. Fry. December 2, 1868, the administrator filed in said court his petition for the sale of said real estate, to make assets for the payment of the general debts of said decedent. The widow and children of the decedent were made parties to this proceeding, and were duly notified of its pendency. A default was taken against the widow, Elizabeth Fry, and against Melissa Shaffer, Arena Wolf, and William Fry, the adult children of the decedent. The infant defendants, Isaac Fry, Albert Fry, Oliver Fry, and Abraham I. Fry, appeared by guardian *ad litem*, who filed an answer in their behalf. The proceedings resulted in an order directing the sale of "*the undivided two-thirds part in value of the said real estate, being exclusive of the widow's interest.*" By virtue of the order so obtained, the administrator on October 22, 1869, sold the real estate at public auction to one John D. Evans for \$1,800. Two months and twenty days after such sale, to wit, on January 11, 1870, the administrator with the leave of the court filed an amended petition for an order to sell the real estate which had been sold by him October 22, 1869, averring in said petition the insufficiency of the personal estate to pay the debts of the decedent; that the decedent died the owner of the lot in question; that a part of the indebtedness of the estate consisted of State and county taxes to the amount of \$200, assessments for street improvements to the amount of \$300, and a mortgage debt for the unpaid purchase money of said real estate to the amount of \$700, with interest, all of which were liens on said real estate, and that the holders of said claims were threatening, if not paid, to enforce the same against the said lot. It was further alleged in this amended petition that the widow of the decedent was a second, childless wife; that she owned a life interest in said real estate to the one-third part thereof, provided the said encumbrances were paid off;

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and that the decedent left, as his only heirs, the children by former marriages already named. The court permitted this amended petition to be filed as of the date of the original petition, to wit, December 2, 1868.

On the same day this so-called amended petition was filed, to wit, January 11, 1870, the administrator filed a report showing that, after proper notice, he had sold the lot at public auction to one John Evans for \$1,800, and that the purchaser had paid down \$600, and executed his notes for the remainder at nine and eighteen months, with security.

The sale was confirmed by the court, and a further order was made in these words: "It further appearing by the evidence that said real estate, named in the petition, was sold without any regard to the life interest of the widow of said decedent named in the petition, and it further appearing that said widow was the second wife of said decedent, and that the deceased died without leaving any children by her, and he left at his death children by his former wife, alive at his death, and she has only a life interest in the premises.

"And it is therefore ordered by the court that said administrator settle with said widow, and allow her a fair compensation for her interest in the said property, and that said interest is to be *exterminated* before the said John D. Evans, said purchaser, shall be compelled to pay said notes given for said purchase money, as aforesaid, as her interest was not considered and deducted in the sale to him, and said administrator is ordered to execute a deed of conveyance to said purchaser, and said administrator now reports a deed of conveyance of said real estate, so sold to said purchaser, which is examined and approved by the court."

Immediately after the court made the foregoing order, the administrator filed a report, dated January 10, 1870, showing that he had executed to Evans a deed for the premises, and had received from him a mortgage on the same, securing the balance of the purchase money.

The first current report of the administrator, made April

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15, 1872, showed that he had received (inclusive of the \$1,800 for the real estate so sold, and \$75 as rents) \$3,537.87; and that he had paid out \$3,176.85, leaving a balance of \$361.02 in his hands. Among the payments so made was one of \$200 to the widow of the decedent, for which she executed a receipt stating that the sum so paid was in full of her dower in the house and lot sold by the administrator to pay debts. Another of the payments made by the administrator, as shown by this report, was one of \$900 on account of a debt for the purchase money of a tract of land in Hamilton county.

On the 19th of April, 1873, pursuant to the order of the court, and for the purpose of making assets to pay debts, the administrator sold certain other lands of the decedent, situated in said Hamilton county for the sum of \$1,500, and received the purchase money therefor.

The administrator collected some \$60 interest, and \$131 rents, and on September 3, 1875, he filed his final report, which showed among other things a payment of \$240.78 to the guardian of the infant children, and a balance of \$456.02 for distribution. The report was approved, the said balance was paid into court, and the administrator discharged.

This balance was ordered paid to Isaac Fry, Arena Wolf, Melissa Shaffer, William Fry, Oliver Fry, Albert Fry, and Abraham L. Fry, in shares of \$65.15 each, and the same was received, and receipted for by William Hair, guardian of Abraham, Albert, and Oliver Fry; by William Fry and Isaac Fry in person; by Melissa Shaffer by her attorney in fact; and by Isaac Fry, administrator of the estate of Arena Wolf, deceased.

The administrator was not empowered by any order of the court to rent the real estate of the decedent, but he did in fact collect rents to the amount of \$206, which he included in his account, and they were embraced in the final balance reported for distribution.

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Arena Wolf, one of said children, died in the year 1874, leaving as her sole heirs two children, William Wolf, and ——— Wolf, the latter of whom died in 1888, leaving his said brother, one of the appellees, his sole heir.

John D. Evans, the purchaser at the sale by the administrator, took possession of said lot number forty-four immediately upon the delivery of the deed therefor to him, and he and his son, Frederick Evans (who, upon his death, inherited all of his interest in said real estate), and Joseph E. Bell, the grantee of Frederick Evans, ever since have been in the open, notorious, peaceable, and exclusive possession of the whole of said real estate, claiming title thereto, receiving all the rents and paying all taxes and assessments against the same as they matured. The said Frederick Evans, on September 18, 1885, obtained from Elizabeth Fry, the widow of said decedent, a quitclaim deed for all of said Marion county real estate, for which he paid her \$450. The said Frederick afterwards sold and conveyed said lot number forty-four, by warranty deed, to the appellant, Joseph Bell, for a valuable consideration. Bell bought the property under the belief that he was obtaining title to the whole of it, but with the knowledge that Evans' title was derived through the administrator's deed before mentioned, and, before his purchase, he was furnished with an abstract of the records showing the title to said lot. He had heard nothing of the claim of the appellees until the complaint in this action was filed. Bell expended \$400 in remodeling the house, and improving said property, and he paid interest on an assessment for street improvements, and the first installment of the taxes of 1896, amounting together to \$45.37, and there remains unpaid, on account of such street improvement, \$742, which is not yet due. The widow of the decedent died November 24, 1895.

Upon the facts found, the court stated the following conclusions of law: (1) That plaintiffs are the owners in fee simple of an undivided one-third of lot number forty-four,

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in Sorin's subdivision, in said findings described, subject to one-third, in amount, of said street improvement lien. (2) That partition should be made. That said lot number forty-four cannot be subdivided without injury to the interests of the parties therein. That the whole thereof should be sold. That such sale should be made by a commissioner, to be hereafter appointed, on terms to be provided in the decree. (3) That the proceeds of such sale should be applied to the discharge of the street improvement lien, to the costs hereof accrued, and to accrue, and the balance thereof should be paid, two-thirds to defendant Joseph E. Bell, and one-third to plaintiffs; the last named one-third to be charged with \$200 attorneys' fees in favor of plaintiffs' attorney. (4) That defendant, Joseph E. Bell, take nothing by his cross-complaint herein.

The appellants contend that the appellees have no interest in the lot in question, and that the judgment of the Marion Superior Court is erroneous. (1) Because said lot number forty-four, not being susceptible of division, and being encumbered by a mortgage for purchase money, and by liens for taxes and street improvements, the court of common pleas of Hamilton county had jurisdiction to order the sale of the whole of said lot, and that as said court of common pleas also had jurisdiction of the parties, its orders and judgment declaring that the widow held a life estate only, and confirming the sale to Evans, the purchaser, are binding and conclusive. (2) Because the appellees are estopped by their receipt and retention of the purchase money to deny the validity of the sale of the whole of said lot by the administrator. (3) Because the claim of the appellees is barred by the statute of limitations.

The propositions advanced by the appellants cannot be sustained. No petition was filed in the common pleas court of Hamilton county for the sale of the whole of lot number forty-four, for the payment of a mortgage debt for purchase money, or other liens. The proceedings were instituted for

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the purpose of obtaining an order to sell such part of the lot as was liable to be sold for the payment of the claims of general creditors. It is true that, upon proper application, the court might have authorized the administrator to sell any of the real estate of the decedent for the payment of the purchase money, or any valid lien thereon. §89 R. S. 1852, p. 269.

But the court was not asked to make such order, and it made no order for the sale of lot number forty-four, or any interest therein, for the payment of purchase money, or any valid lien, and the entry cannot be understood to mean anything of the kind. Nor did the court, at any time, empower the administrator to sell the whole of said lot. The only order authorizing the sale was in these words: "And the court finds that it is necessary to sell said real estate of said decedent to pay the outstanding debts against said estate. And the court does now order and direct said administrator to sell the *undivided two-thirds' part in value, of said real estate* (being exclusive of the widow's interest) to wit, lot number forty-four, etc." Under this order, the administrator was authorized to sell two-thirds only of the lot, and the purchaser at such sale took the lot subject to all liens and encumbrances. *Shriver v. Lynn*, 2 How. 43; *Bethel v. Bethel*, 6 Bush. (Ky.), 65; *Clarke v. Henshaw*, 30 Ind. 144; *Martin v. Beasley*, 49 Ind. 280.

The words "being exclusive of the widow's interest" cannot be regarded as increasing the quantity of the lot ordered to be sold beyond the two-thirds in value. By no rule of construction can the order be interpreted to mean that the whole of the lot should be sold, exclusive only of a life estate in the widow.

The filing of a so-called amended petition to sell, more than two months after the sale of the lot had actually been made under the original petition and order, and the entry on the record that the same be treated as filed as of the date of the original petition, were illegal, unprecedented, and void.

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But even this last named petition did not ask for an order to sell the whole of said lot, free from the widow's interest, to pay a debt for purchase money, or for the discharge of any valid lien on the same. No order to sell was made upon the last petition, and whatever title was acquired by the purchaser was obtained under the order first made. The sale was at public auction, upon an order directing the sale of two-thirds of the lot. Other bidders, if any were present, must have understood that only two-thirds of the lot would be sold. After the sale, the court had no power by any order or proceeding to make a gift of the remaining third of the lot to the purchaser of the two-thirds. With all of the liberality which can be extended to proceedings of this character, it is impossible to sanction or uphold the attempt of the court, two months after the sale had taken place, to convert a petition for the sale of real estate to pay the general creditors into an application to sell a lot to discharge specific liens; or to enlarge the sale of two-thirds of a lot, so as to include the entire premises. *Angle v. Speer*, 66 Ind. 488; *Lewis v. Owen*, 64 Ind. 446; *Verry v. McClellan*, 6 Gray 535; *Tenny v. Poor*, 14 Gray 500.

It is said by Mr. Freeman, in his work on Void Execution, Judicial, and Probate Sales, at page 45, that "Probate sales, we are sorry to say, are generally viewed with extreme suspicion. Though absolutely essential to the administration of justice, and forming a portion of almost every chain of title, they are too often subjected to tests far more trying than those applied to other judicial sales. Mere irregularities of proceeding have, even after the proceedings had been formally approved by the court, often resulted in the overthrow of the purchaser's title. In fact, in some courts, the spirit manifested toward probate sales has been scarcely less hostile than that which has made tax sales the most precarious of all the methods of acquiring title." It may be suggested that the reason for this spirit is not far to seek. The loose and slipshod methods of many courts of probate juris-

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diction in cases where the rights and titles of heirs are involved cannot receive the approval of appellate tribunals when they come under review. While applications for the sale of real estate are nominally adversary proceedings, they are, in fact, in most cases, *ex parte*, the administrator looking after, or being expected to look after, as well the interests of the widow and heirs as the rights of creditors. The widow and adult heirs usually make default, and the minors are represented by a guardian *ad litem*, who appears *pro forma* only. Under such circumstances, to permit the probate court to play fast and loose with petitions and orders, without regard to any rules of law, or orderly procedure, is to encourage a dangerous laxity in practice, and to trifle with the important rights of property. This court has generally been indulgent toward probate sales, but no decision goes to the length of sustaining a proceeding by which heirs at law are divested of their title to real estate without even an order of the court directing the sale of such interest.

But for another and distinct reason, the claim of the appellant to the one-third of the lot must fail. The court of common pleas of Hamilton county had not jurisdiction to order the sale of more than two-thirds of the lot to make assets for the payment of the claims of general creditors. The statute in force at the time of the death of Charles O. Fry, regulating the descent of real estate, was as follows:

"Section 17. If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors; *Provided, however,* that where the real estate exceeds in value \$10,000, the widow shall have one-fourth only, and where the real estate exceeds \$20,000, one-fifth only as against creditors
* * *"

"Section 24. * * * *Provided,* That if a man marry a second or other subsequent wife, and has, by her, no children, but has children alive, by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children." 1 R. S. 1852, pp. 250, 251.

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A construction was given to these provisions of the statute in *Louden v. James*, 31 Ind. 69, in which it was held that when a man dies leaving surviving him a widow, who is a second or subsequent wife, by whom he has no children, but leaving children by a previous wife, the widow, as against creditors, takes the same share of his real estate in fee simple as if a first wife, and at her death that this fee simple descends to the children of the husband, free from the demands of his creditors. This decision was made May 27, 1869, while the sale in question took place October 22, 1869, so that the purchaser at that sale had before him the latest interpretation of the statute, declaring that the one-third taken by the widow was held by her in fee as against creditors, and that, at her death, it would descend to the children of the decedent. This ruling was followed in *Caywood v. Medsker*, 84 Ind. 520, and was there declared to have been "the law and rule of property," from the time it was made.

As the petition in this case was for the sale of the real estate to make assets generally, and not to pay a claim for purchase money, or other specific lien, the share taken by the widow was not subject to sale, and the interest of the children of the decedent, by his former marriages, could not be affected by any order or proceeding of the court upon such petition. They had no present estate, but were merely expectant heirs, so that it was not possible for them to object to the petition or order, nor necessary for them to make any defense against the same. *Utterback v. Terhune*, 75 Ind. 363; *Armstrong v. Cavitt*, 78 Ind. 476; *Bryan v. Uland*, 101 Ind. 477; *Habig v. Dodge*, 127 Ind. 31; *Byrum v. Henderson*, 151 Ind. 102; *Gwaltney v. Gwaltney*, 119 Ind. 144; *Pepper v. Zahnsinger*, 94 Ind. 88; *Erwin v. Garner*, 108 Ind. 488.

The pleas in estoppel are not sustained by the findings or the evidence. The record, as has been seen, contains

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nothing which prevented the appellees from asserting their title to the one-third of the lot, which was taken by the widow, and which, at her death, descended from her to them as her statutory heirs. Neither can they be deprived of their inheritance, because a small amount of money, derived from the estate of their father, was distributed to them. It nowhere appears that this money was derived from the sale of the one-third of the lot now claimed by them, but, on the contrary, it is manifest that this one-third was not sold at all under any order of the court. *Flenner v. Travelers Ins. Co.*, 89 Ind. 164; *Erwin v. Garner*, 108 Ind. 488.

The death of the widow of the decedent did not occur until November 24, 1895. The appellees did not acquire their title to the one-third of the lot until she died, and, of course, could maintain no action for its recovery, or for partition, previous to that event. Their right was not barred by any statute of limitation. *Habig v. Dodge*, 127 Ind. 31; *Erwin v. Garner*, 108 Ind. 488; *Gwaltney v. Gwaltney*, 119 Ind. 144; *Schori v. Stephens*, 62 Ind. 441; *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379.

Appellees have assigned as a cross error the conclusion of law that the attorney's fee allowed them should be taxed against their share of the proceeds of the sale of the real estate, instead of being paid out of the whole fund to be derived from such sale. The ruling of the court in this point was clearly right. No reason exists why a defendant in a partition suit, who appears by attorney, to contest the title of the plaintiff, should be compelled to contribute to the payment of the attorney's fees of his adversary, and we can not believe that the statute was intended to subject him to such liability. *Merrill v. Shirk*, 128 Ind. 503.

It is said in *Kilgour v. Crawford*, 51 Ill. 249: "Where the proceedings are amicable, and the parties defendant do not deem it necessary to employ counsel to protect their interests, it is proper that the power given by this law should be exercised, as all the parties have the benefit of

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the partition. But where the defendants deem it necessary to employ counsel, in order to protect their interests, and secure a just partition, or an equitable assignment of dower, we can see no reason why they should be required not only to pay the fees of their own counsel, but also a part of the fees of adverse counsel. * * * In these partition proceedings, the defendants have generally been guilty of no default or wrong."

Section 1222 Burns 1894, under which appellees claim the right to an allowance of attorney's fees, to be taxed against the entire fund, is not strictly mandatory, but such taxation, in any case, is to be awarded in such proportions against each of the parties as the court may determine. *Ex parte Fidelity Ins. Co.*, 108 Pa. St. 339, 1 Atl. 233; *Stempel v. Thomas*, 89 Ill. 146; *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. 407; *Westmoreland v. Martin*, 24 S. C. 238.

Finding no error in the record, the judgment is affirmed.

ROSENBARGER v. THE STATE.

[No. 19,180. Filed April 4, 1900.]

CRIMINAL LAW.—*Indictment.—Duplicity.—Administering Poison.*—

Under the provision of §1919 Horner 1897 making it a crime to administer or procure to be administered any poison to another human being, the State in charging the accused with having violated its provisions may in a single count of the indictment, by using the conjunction *and* instead of *or*, as employed in the statute, charge the commission of as many prohibited acts as may be deemed necessary to render the indictment applicable to the evidence without rendering it bad on account of uncertainty or duplicity. pp. 426-428.

SAME.—*Indictment.—Administering Poison.*—An indictment charging that defendant unlawfully, feloniously and with premeditated malice administered poison with intent to kill and murder is not bad for failing to state the quantity of the poisonous drug administered. p. 428.

EVIDENCE.—*Weight.—Criminal Law.*—It is the province of the trial court to weigh and determine the credibility to be given the evidence introduced, and the Supreme Court will not disturb the judgment on the weight of the evidence where there is evidence, if worthy of belief, sufficient to sustain the finding upon every material point. pp. 429, 430.

154	426
156	636
154	426
1167	552
154	426
181	672
182	557

154	425
1170	539

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From the Gibson Circuit Court. *Affirmed.*

C. A. Buskirk and *J. W. Brady*, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley* and *James Kilroy*, for State.

JORDAN, J.—Appellant was charged by indictment with the crime of administering poison to one Alva Rosenbarger with the felonious intent to kill and murder. A trial by the court resulted in finding her guilty as charged, and her punishment was fixed at imprisonment for a term of seven years, and over her motion for a new trial she was sentenced accordingly.

The errors assigned are predicated upon overruling the motion to quash the indictment and in denying the motion for a new trial. The charging part of the indictment is as follows: "That one Rebecca Rosenbarger, late of said county, on the 6th day of November, A. D. 1898, at the county and State aforesaid, did then and there unlawfully, feloniously, and with premeditated malice, administer and procure to be administered to one Alva Rosenbarger a certain poison, to wit, hydrate of chloral, with intent then and there and thereby, him, the said Alva Rosenbarger, feloniously, purposely, and with premeditated malice, to kill and murder."

The crime charged is defined by §1992 Burns 1894, §1919 R. S. 1881 and Horner 1897: "Whoever administers, or procures to be administered, any poison to any other human being, or mingles poison with any food, drink, or medicine, with intent to kill or injure the person to whom the same shall be administered, if death do not ensue, upon conviction thereof, shall be imprisoned in the State prison not more than fourteen years nor less than three years."

It is urged by appellant's learned counsel that the court ought to have quashed the indictment because it is open, as they insist, to the following objections: (1) It is bad because of duplicity; (2) it is self-contradictory; (3) it is

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uncertain; (4) it charges the crime to have been committed by the administration of poison without specifying what quantity of the drug was administered.

It will be observed that the statute upon which this prosecution is based declares disjunctively that it shall be a crime: (1) For any one to administer any poison to any other human being. (2) To procure any poison to be administered to any other human being with intent, etc. So far as this case is concerned it may be said that the statute in question makes it a crime to do any one or both of two acts, namely, to administer the poison, or to procure the same to be administered. These acts under the statute are punishable alike.

The indictment, as it will be seen, charges conjunctively that appellant did "administer and procure to be administered to one Alva Rosenbarger a certain poison, etc." The violation of the statute in controversy by any one, in respect to either or both of these forbidden acts, constitutes but a single offense, and subjects the violator upon conviction to the penalty therein provided. In fact it may be asserted that the proper construction to be placed upon a penal statute of the character of the one here involved is that where a person in one transaction commits any or all of the forbidden acts, he thereby violates the provisions of the statute but once, and incurs upon conviction the one penalty. This construction has been frequently adopted and followed by this court in cases where a statute of the character of the one in question was involved. In such a statute, the State, in charging the accused with having violated its provisions, may in a single count of the indictment, by using the conjunction *and*, as was done in the pleading in this case, in place of *or*, as employed in the statute, charge the commission of as many of the prohibited acts as may be deemed necessary to render the indictment applicable to the evidence, without making it subject to the charge that it is bad on account of duplicity, uncertainty, or that it is con-

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tradictory. On the trial of such a prosecution, if any one or all of the acts so charged to have been committed by the defendant be proved, he will be convicted, and will incur the punishment provided by the law. It certainly is not true, as insisted by counsel for appellant, that it was utterly impossible for appellant in one transaction to both administer and procure the poison to be administered to the person charged in the indictment. The word "procure" is employed in the statute in the sense of cause. That a person may in the same transaction both administer poison and cause the same to be administered to another person is surely not an impossible feat.

The rule which we assert in respect to the question as involved in this appeal is well affirmed by the decisions of this court and by many other authorities. *State v. Kuns*, 5 Blackf. 314; *State v. Slocum*, 8 Blackf. 315; *Fahnestock v. State*, 102 Ind. 156; *State v. Fidler*, 148 Ind. 221, and cases there cited; 1 Bishop's Crim. Proc. §436.

There is no merit in the fourth objection made to the indictment. As a matter of pleading it was not essential, to constitute a good indictment under the statute in question, that the quantity of the poisonous drug administered be stated. It is true, as counsel for appellant contend, that hydrate of chloral is used for medicinal purposes, as are other poisonous or noxious compounds or drugs; but the court also judicially knows that this particular drug is poisonous in its nature, and when taken into the system in a sufficient quantity will produce death by reason of its poisonous effects. When the averments of the indictment are considered, whereby it is charged that this drug was by appellant "unlawfully, feloniously, and with premeditated malice, administered * * * with intent then and there and thereby, him, the said Alva Rosenbarger, feloniously, purposely, and with premeditated malice, to kill and murder", it certainly is made to appear that the drug administered was sufficient in quantity to carry into effect the felonious intent. *Epps*

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v. *State*, 102 Ind. 539. It follows that the indictment was not open to the objection urged by appellant, and the motion to quash it was properly denied.

It is next insisted that the evidence is not sufficient to sustain the finding of the court. The insistence upon this feature of the case is not that there is an absence of evidence upon any material point, but the contention is that the testimony given by the prosecuting witness, Alva Rosenbarger, is so contradictory, unreliable, and improbable, as to render it wholly unworthy of credit, and therefore it ought not to be considered. The judgment of the court in the main may be said to rest upon the evidence of the prosecuting witness. This witness was the son of appellant, and, as the evidence shows, he was seventeen years old. Appellant, as the evidence discloses, held an insurance policy upon his life, payable to her at his death. This policy seems to have been taken out by the son but a short time prior to the commission of the crime of which appellant was convicted. The son stated positively upon the trial that he and his mother, at the time charged, were in a room together in Princeton, at the residence of Dr. Hudson, where she was employed as a domestic. He testified that she gave him a bottle containing the drug in question, and told him that it was something to remove the pimples on his face, and advised him to take it. He testified that he took the drug to the room which he occupied, and upon retiring that night he took a part of it, and then fell into a stupor, from the effects of which, through medical aid, he finally recovered. After his recovery he seems to have signed a written statement to the effect that he took the drug for the purpose of committing suicide. Without going into a review of his evidence, it may be said that his statements in the main are contradicted by circumstances and the evidence of other witnesses, and it may be asserted that the story which he told is unnatural and improbable. The fact, however, appears that appellant was the beneficiary under the insurance policy, and this seems to have supplied a ground for the

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motive upon her part for committing the crime in question. If the evidence given by her son can be credited, she is guilty of the atrocious crime charged against her, and was properly convicted.

The learned and conscientious judge who presided at the trial and who heard, considered, and determined the question of appellant's guilt, seems to have believed the testimony of the prosecuting witness. It was especially the province of the trial court to weigh and determine what credibility, if any, under all the circumstances, ought to be given to the evidence introduced upon the trial. We must presume, therefore, that this duty was correctly and properly discharged. The rule that we have no authority to weigh evidence is one which is firmly settled, and as there is evidence in this case, which, if worthy of belief, is sufficient to sustain the finding upon every material point, we can not, therefore, disturb the judgment upon the question urged by appellant as to the sufficiency of the evidence. The judgment is therefore affirmed.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. KLEE.

[No. 18,737. Filed Feb. 23, 1900. Rehearing denied April 4, 1900.]

• NEGLIGENCE.—*Infants*.—*Non Sui Juris*.—It cannot be said as a matter of law that a child nine years of age is either capable or incapable of negligence. p. 432.

SAME.—*Complaint*.—*Contributory Negligence*.—*Infants*.—*Non Sui Juris*.—A complaint in an action for personal injuries alleging that plaintiff by reason of his immature age, judgment, and experience did not comprehend the danger of the situation, and was incapable of negligence in the premises, is not bad for failing to allege that plaintiff was free from negligence contributing to his injury. p. 432.

SAME.—*Non Sui Juris*.—*Contributory Negligence*.—Where in an action for personal injuries a paragraph of complaint charged that plaintiff was *non sui juris*, and incapable of negligence, a finding that plaintiff was capable of contributory negligence would defeat the action on that paragraph whether he was shown to be guilty thereof or not. p. 432.

154	430
156	423
154	430
158	276

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NEGLIGENCE.—Violation of City Ordinance.—Proximate Cause.—Complaint.—A complaint in an action for personal injuries charging the violation of a city ordinance as one of the elements of defendant's negligence is not rendered bad by its failure to show that the violation of the ordinance was the proximate cause of plaintiff's injury. *p. 433.*

SAME.—Contributory Negligence.—Proximate Cause.—Railroads.—A complaint against a railroad company for personal injuries alleging that the defendant ran its locomotive against plaintiff, and negligently dragged him 200 feet, although by the exercise of care and caution it could have stopped the locomotive before plaintiff was injured, states a cause of action, although plaintiff was guilty of negligence in being upon the track, since such negligence on the part of plaintiff was not the proximate cause of the injury. *pp. 433-435.*

SAME.—Instructions.—Railroads.—An instruction in an action against a railroad company for an injury received at a railroad and street crossing that if defendant's servants saw plaintiff on the track, and saw that his attention was diverted from the approaching engine in time to have stopped, by the exercise of ordinary care, before striking plaintiff, the jury would be justified in finding that defendant was guilty of negligence was erroneous. *pp. 435-437.*

From the Hancock Circuit Court. *Reversed.*

John T. Dye, B. K. Elliott and W. F. Elliott, for appellant.

R. A. Black and W. J. Beckett, for appellee.

BAKER, J.—In Indianapolis appellant maintains a line of railroad in Georgia street. Helen street runs north and south and crosses Georgia street at right angles. On June 22, 1894, at this crossing, appellee, a boy nine years of age at the time of the injury, was struck by appellant's switch-engine. This action was begun on December 11, 1895, in the Marion Superior Court, and the venue was changed to the Hancock Circuit Court. The complaint is in six paragraphs, the last charging a wilful injury and the others counting on negligence. Appellant's demurrer to each of the first five paragraphs for want of sufficient facts was overruled. Answer of general denial. General verdict for appellee for \$5,000. Appellant's motion for a new trial was overruled. The errors assigned are the rulings on the demurrer and the motion for a new trial.

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Objection is made to the first paragraph because it does not allege that the plaintiff was free from contributory negligence. This paragraph avers in substance that the plaintiff, a boy nine years old, was of such immature age, judgment and experience that he did not comprehend and appreciate the danger of the situation and was incapable of negligence in the premises. A child nine years old has passed the age when the law conclusively affirms that he is incapable of negligence; and, on the other hand, he has not reached the age when the law definitely pronounces his conduct negligent or prudent by the rules applicable to adults. Regarding the conduct of a child between the age when he is conclusively presumed to be incapable of negligence and the age when he is conclusively presumed to be negligent under the same circumstances that would reveal an adult's negligence, the law is neutral; it lays down no conclusive presumption. Of such a child it can not be said as a matter of law that his age shows him either incapable or capable of negligence. That question is to be determined as a fact in every such case. Beach Contr. Neg. (3rd ed.), §§21b, 117, 136; Patterson Ry. Acc. Law §§70-73; *Indianapolis, etc., R. Co. v. Pitzer*, 109 Ind. 179; *Indianapolis, etc., R. Co. v. Wilson*, 134 Ind. 95; *Terre Haute St. R. Co. v. Tuppenbeck*, 9 Ind. App. 422; *Bridger v. Ashville, etc., R. Co.*, 25 S. C. 24; *Missouri, etc., R. Co. v. Rodgers* (Tex. Civ. App.), 39 S. W. 383; Note to *Atchinson, etc., R. Co. v. Hardy*, 94 Fed. 294, 37 C. C. A. 362-8. The averment of the plaintiff's incapacity was therefore an averment of fact and not a legal conclusion. With this averment in the paragraph, it was not necessary to allege that plaintiff was free from negligence contributing to his injury. The case in this first paragraph is of one who is *non sui juris*, and would be defeated by a finding that plaintiff was capable of contributory negligence whether in fact he was guilty thereof or not.

The sufficiency of the second paragraph is challenged on the ground that it does not state that plaintiff was injured

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without contributory negligence on his part. An examination of the paragraph, however, discloses that a direct averment to that effect is made and that no specific facts in repugnance thereto are alleged.

The third paragraph is said to be insufficient because it counts on the violation of an ordinance as the actionable negligence of appellant and then fails to show that such violation was the proximate cause of plaintiff's injury. The violation of the ordinance was merely one of several elements in the appellant's negligence as charged in this paragraph. As was said in *Cleveland, etc., R. Co. v. Gray*, 148 Ind. 266, 271: "Because the particular act of negligence prohibited by the statute is included in the sum total of negligent acts charged against appellant, it does not follow that the theory of the complaint is thereby confined and limited to the statutory offense charged."

The fourth paragraph charges: "That on or about the 22nd day of June, 1894, this plaintiff, a child of nine years of age, was on said crossing of Georgia and Helen streets, and upon said track of said defendant in said Georgia street without fault or negligence on his part, and while in said position and place, and while in plain view of defendant's servant in control of and managing said locomotive and while seen and distinguished by said defendant's said servant in time to have stopped said locomotive by the exercise of due care, and avoided injury to this plaintiff, the said defendant, through and by its said employes and servants, negligently approached said plaintiff with said locomotive belonging to this defendant, and negligently ran its locomotive against and onto this plaintiff, and negligently dragged this plaintiff a long distance, to wit, 200 feet; and negligently ran onto the right leg of this plaintiff, and negligently injured and crushed the said right leg of this plaintiff then and there,—all without fault or negligence on the part of this plaintiff." This paragraph charges that appellant's servants saw plaintiff on the track in time to have stopped the engine before reach-

Cleveland, etc., R. Co. v. Klee.

ing him, but failed to do so. At that point of time plaintiff, though upon the track, was not in a condition of peril unless he was prevented by some physical or other incapacity from using ordinary care to get off from the track. A child nine years old is not presumed to be *non sui juris*. No facts are alleged showing that he was incapable of understanding the peril that might result from continuing to stand on the track. It is not alleged that he did not see and hear the approaching engine. It is not stated that he did not have the ability and opportunity to step from the track long before the engine would reach the crossing. Nothing is shown in this paragraph that would cause the engineer to doubt his right to rely upon the presumption that plaintiff would heed what he saw and heard and would step from the track in time to avoid injury. *Ulrich v. Cleveland, etc., R. Co.*, 151 Ind. 358; *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490; *Ohio, etc., R. Co. v. Walker*, 113 Ind. 196; *Meredith v. Richmond, etc., R. Co.*, 108 N. C. 616, 13 S. E. 137; *St. Louis, etc., R. Co. v. Christian*, 8 Texas Civ. App. 246, 27 S. W. 932; *Texas, etc., R. Co. v. Breadow*, 90 Texas 26, 36 S. W. 410; *Sheehan v. St. Paul, etc., R. Co.*, 76 Fed. 201, 22 C. C. A. 121.

It is alleged in the fifth paragraph: "That on or about the 22nd day of June, 1894, this plaintiff, a child nine years of age, was on the said crossing of Georgia and Helen streets and upon said track of said defendant in said Georgia street; and while in said position and place, the defendant through and by its said employes and servants, ran said locomotive against this plaintiff and negligently dragged this plaintiff without fault or negligence on his part, a long distance, to wit, 200 feet; that the defendant knew that it had run its locomotive against this plaintiff at said crossing; and knew that it had knocked this plaintiff down in front of its said locomotive upon its said track; and knew that this plaintiff was dragging in front of said locomotive on said track; but that this defendant negligently failed to stop

said locomotive before this plaintiff was injured, although by the exercise of due care and caution it could have stopped said locomotive before this plaintiff was injured; but negligently dragged this plaintiff as aforesaid, without fault or negligence on the part of this plaintiff, and negligently injured this plaintiff in his body, back and limbs." The injury for which compensation is sought in this paragraph was not sustained in the collision at the crossing, but was wholly inflicted after appellant knew that appellee was being dragged along the track in front of the engine. By the exercise of due care appellant could have stopped the engine before appellee was injured, but failed to do so. Appellee, after being struck and while being dragged along the track, was free from fault contributing to his injury. These allegations constitute a cause of action. Though the paragraph confesses, by not denying, that appellee was guilty of negligence in being upon the track, that negligence was only the remote condition, not the proximate cause, of the injury complained of; for the injury resulted, after the collision, entirely from occurrences in which it is alleged that appellant was negligent and appellee was not.

The questions arising on the motion for a new trial relate to instructions. In the main they are accurate and clear; but in one respect, at least, there seems to be an irreconcilable antagonism. At one point the court charged the jury: "The persons in charge of the engine, even if they saw the said Frank Klee on the track, had a right to presume that he would leave the track in time to avoid injury, and they cannot be regarded as negligent if they acted upon that presumption, unless it appeared to them that he was in a helpless condition or was of such tender years as not to have sufficient intelligence to understand the danger and step from the track". At another place: "If you find from the evidence that plaintiff Frank Klee was standing upon the defendant's track at the place of the happening of the accident, if any, and that his attention was diverted from the

Sterling Remedy Co. v. Wyckoff.

a foreign corporation, against appellant to recover the value of a typewriting machine sold by appellee to appellant in May, 1895. Appellant filed an answer in abatement, alleging that prior to the commencement of this action appellee had entered in an agreement, contract, and combination with other manufacturers of typewriting machines, in violation of the anti-trust act of 1897, which took effect April 14, 1897 (Acts 1897, p. 160). Appellee's demurrer for want of facts to said answer in abatement was sustained, and final judgment rendered in favor of appellee. The only question is: Did the court err in sustaining said demurrer to the answer in abatement?

It is claimed by appellant that appellee having before the commencement of this action entered into the alleged combination, in violation of said act of 1897, that the commencement of this action thereafter was "doing business in this State," within the meaning of said act, and that, therefore, section two of said act denied appellant the right to bring and prohibited it from prosecuting this action.

The contract sued upon was entered into and performed by appellee, and the amount thereof was due and payable by appellant, nearly two years before the anti-trust law of 1897 took effect. Said law was prospective, and not retrospective; it was not intended to, and did not, affect contracts previously made, nor their enforcement, and has no application whatever to such contracts. *Security, etc., Assn. v. Elbert*, 153 Ind. 198; *Equitable, etc., Assn. v. Peed*, 153 Ind. 697; *National, etc., Assn. v. Black*, 153 Ind. 701; *United States, etc., Co. v. First Methodist Church*, 153 Ind. 702. As said act has no application to the contract of sale sued upon, it is not necessary to determine whether or not the commencement of an action on a contract entered into after the alleged combination of appellee and other manufacturers would be "doing business in this State" within the meaning of said act. It follows that the court did not err in sustaining the demurrer to the answer in abatement. Judgment affirmed.

State, *ex rel.*, v. Nickerson.

THE STATE, EX REL. SOMMERLAD ET AL., v. NICKERSON ET AL.

[No. 18,777. Filed April 5, 1900.]

JUSTICES OF THE PEACE.—*Change of Venue.*—*Costs.*—Payment of costs is a condition precedent to the right of change of venue in actions before justices of the peace.

From the Marion Superior Court. *Affirmed.*

W. P. Adkinson, for appellants.

S. W. Mansfield, S. N. Chambers, S. O. Pickens and C. W. Moores, for appellees.

BAKER, J.—The relators filed their verified application for a writ of mandate, showing that appellee Thudium had begun an action against relators in the court of appellee Nickerson as justice of the peace for Center township in Marion county; that relators appeared on the return day and filed a proper affidavit for a change of venue from the township; that the justice refused to grant the change except upon payment of the costs of the change in advance, which the justice stated to be \$2; that relators refused to pay any sum in advance, but stated their ability and willingness to pay, after the change was granted and the transcript prepared, whatever sum might legally be found due for the completed work; that the justice declined to grant the change on the terms proposed by relators; that afterwards on the same day, in the absence of relators, the justice rendered judgment in the case; that two days later relators tendered the justice \$2 and demanded that he grant the change of venue and prepare and transmit the transcript; that the justice refused; and that the appellees are about to take steps to enforce the judgment. On this application, the court declined to proceed.

As the parties who are named as appellees were not brought into court by alternative writ or otherwise, they were

Ex Parte Sullivan.

not parties to the judgment, and this appeal should have been prosecuted as an *ex parte* proceeding. *Ex parte Loy*, 59 Ind. 235. But, so considered, the application affords no basis for sustaining a motion for the issuance of an alternative writ. The statute in relation to proceedings in justices' courts provides that "No change of venue shall be granted, except on payment, or confession of judgment therefor and replevy thereof, of all costs occasioned by the change". §1469 R. S. 1881 and Horner 1897, §1537 Burns 1894. Payment is a condition precedent to the right. The costs that will be occasioned by the change can be readily ascertained; and, if an overcharge is made by the justice, the party has ample remedies by civil and criminal actions. If the party should tender the justice the lawful costs that would be occasioned by the change, he might be entitled to a writ of mandate to compel the justice to grant the change; but these relators declined to pay or secure the costs as the statute requires. Cases cited in reference to the right to have changes of venue in circuit courts are inapplicable, because the statute providing therefor (§413 R. S. 1881 and Horner 1897, §417 Burns 1894) is essentially different from the statute here involved.

Judgment affirmed.

EX PARTE SULLIVAN.

[No. 19,040. Filed April 5, 1900.]

APPEAL AND ERROR.—Parties.—Drains.—Where in an appeal from a judgment establishing a drain the parties to the judgment, adverse to appellants, are not made parties to the appeal the appeal will be dismissed.

From the Madison Superior Court. *Appeal dismissed.*

C. K. Bagot, A. Ellison and T. Bagot, for appellants.

W. A. Kittinger, E. D. Reardon and W. S. Diven, for appellees.

154	440
157	610

154	440
158	502

154	440
159	873

154	440
163	478

154	440
170	549

154	440
171	463

Ex Parte Sullivan.

PER CURIAM.—Martha J. Sullivan and others filed a petition for drainage in the Madison Circuit Court, and, after notice, the same was referred to the drainage commissioners. The drainage commissioners filed their report, and notice thereof was given to the new parties named in said report, who were not named in the petition. A number of remonstrances were then filed. Afterwards an agreement was made between all the parties, which was approved and ratified by the court, and adopted as its findings; and the report of the drainage commissioners was set aside and the matter referred to new commissioners for report. Afterwards a report was filed by said commissioners, and notice to the new parties made by said report was ordered.

Levi P. Brown and others, appellants, being new parties brought in by said last report, filed remonstrances. The venue of said cause was changed to the court below on the affidavit and motion of one of the remonstrants. The cause was tried by the court, and judgment rendered establishing said proposed work, and approving the assessments, damages, and benefits as set out in the report of the drainage commissioners and as modified by the court. From this judgment Levi P. Brown and a number of other remonstrants appeal. The transcript was filed in this court June 30, 1899.

The petitioners for said drainage in the court below enter a special appearance by their attorneys, and move to dismiss the appeal for the reason that no persons are named as appellees in the assignment of errors. The assignment of errors is entitled: "*Ex parte* Martha J. Sullivan. Petition for Drainage." In the body of the assignment of errors the names of the remonstrants who assign errors are set out, but no appellees are named. Appellants claim, however, that there were no persons to make appellees in this court. The entry of the final judgment in the court below recites that the "petitioners being present by Kittinger, Reardon, and Diven, and Crouse and Jones, their attorneys, and the remonstrants [naming them] being present by their attorneys,

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Bagot, Ellison and Bagot"; and then follows the finding and judgment of the court from which the appeal was taken.

It is shown by the record that the petitioners for said drainage were parties to the judgment from which this appeal was taken, and that they were parties adverse to appellants. The assignment of errors is the complaint in this court; and the only persons over whom it acquires jurisdiction are those named therein. *Big Four, etc., Assn. v. Olcott*, 146 Ind. 176; *Bozeman v. Cale*, 139 Ind. 187, 190; *National, etc., Assn. v. Huntsinger*, 150 Ind. 702; *Abshire v. Williamson*, 149 Ind. 248, 252, 256; *Michigan, etc., Ins. Co. v. Frankel*, 151 Ind. 534, 538, 539.

The cause is not, therefore, in a condition to be determined upon its merits, for the reason that the court does not have jurisdiction over all the parties to the judgment below who were adverse to appellants. Such persons should have been made appellees in this court. *National, etc., Assn. v. Huntsinger*, and cases cited, *supra*; *Capital Nat. Bank v. Reid, ante*, 54; *McClure v. Shelburn Coal Co.*, 147 Ind. 119; *Garside v. Wolf*, 135 Ind. 42.

It follows that the motion to dismiss the appeal must be sustained. The appeal is therefore dismissed.

 MCFARLAND v. THE STATE.

[No. 19,238. Filed April 6, 1900.]

CRIMINAL LAW.—*Rape.—Evidence.*—Where in a conviction for rape the evidence failed to show the name of the person upon whom the rape was alleged to have been committed the judgment will be reversed.

From the Hamilton Circuit Court. *Reversed.*

S. D. Stuart and *C. G. Reagan*, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley* and *J. E. Garver*, for State.

BAKER, J.—Appellant was convicted of rape. The affidavit and information name Laura Van Buskirk as the

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alleged victim. In the evidence, the only name proved was Lillie,—nothing more. The name was an essential element in the legal description of the offense. *McLaughlin v. State*, 52 Ind. 279; *McLaughlin v. State*, 52 Ind. 476; *Black v. State*, 57 Ind. 109; *Mitchell v. State*, 63 Ind. 276. For failure of proof, the judgment is reversed, with directions to sustain the motion for a new trial.

THE STATE v. WINSTANDLEY ET AL.

[No. 18,686. Filed April 17, 1900.]

CRIMINAL LAW.—*Banks and Banking.—Embezzlement.—Indictment.*—The same rules of pleading applicable in the prosecution of an official for embezzlement are to be accepted in determining the sufficiency of an indictment against bank officials, under §2081 Burns 1894, for receiving bank deposits when the bank is insolvent. p. 444.

SAME.—*Banks and Banking.—Embezzlement.—Indictment.*—An indictment under §2081 Burns 1894 charging the president and cashier of a bank with having received bank deposits when the bank was insolvent is bad for failure to charge that the money was received by them in their official capacity. pp. 445, 446.

From the Clark Circuit Court. *Affirmed.*

H. C. Montgomery, W. C. Utz, J. K. Marsh, W. L. Taylor, Attorney-General, *F. C. Matson, Merrill Moores* and *C. C. Hadley*, for State.

A. Dowling, C. L. Jewett, H. E. Jewett, M. Z. Stannard, W. H. Watson, C. D. Kelso and *J. V. Kelso*, for appellees.

BAKER, J.—The indictment against appellees was quashed and the State appeals. It charged that on, etc., at, etc., Winstandley was the president and Frederick the cashier of the New Albany Banking Company, a corporation organized under the State laws and doing a banking business at New Albany; that the bank was wholly insolvent, which fact was known to Winstandley as president and Frederick as cashier of the bank; “that they, the said Isaac S. Winstandley and Clarence J. Frederick, each then and there

154	443
154	694
155	232
155	306
154	443
167	419
168	645

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well knowing the insolvency of said New Albany Banking Company, did then and there unlawfully, feloniously, wilfully and fraudulently receive and take from one The F. Wunderlich Company, the sum of \$69.65 in money, of the value of \$69.65, as a deposit with said New Albany Banking Company, the said The F. Wunderlich Company not then and there being indebted to said New Albany Banking Company, whereby the said sum of \$69.65 was lost to said The F. Wunderlich Company, the depositor aforesaid, contrary", etc. The statute reads: "If * * * any officer of any * * * incorporated bank * * * shall fraudulently receive from any person * * * not indebted to said * * * incorporated bank, any money, * * * when, at the time of receiving such deposit, said * * * incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, said * * * officer, so receiving such deposit, shall be deemed guilty of embezzlement." Acts 1891 p. 395, §2031 Burns 1894, §6598 Horner 1897.

Probably it is true, as the State's attorneys claim, that "embezzlement" is an inapt naming of the crime defined in this statute, and that the offense aimed at is fraudulent banking. *Carr v. State*, 104 Ala. 4, 16 South. 150; *Robertson v. People*, 20 Col. 279, 38 Pac. 326; *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176; *State v. Cadwell*, 79 Iowa, 432, 44 N. W. 700; *Commonwealth v. Rockafellow*, 163 Pa. St. 139, 29 Atl. 757; *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *State v. Shove*, 96 Wis. 1, 70 N. W. 312, 37 L. R. A. 142; *In re Cook*, 49 Fed. 833. But it does not follow that the rules of pleading applicable to embezzlement are not controlling in this case. If the defendants are answerable, it is for abuse of their official duties. A consistent system should apply the same rules to all cases in which the abuse of official duty is an essential element, so far as that feature is concerned. And therefore the rules of pleading that govern in bribery of an official, extortion by an official, embezzlement by an official, etc., are

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to be accepted in determining the sufficiency of this indictment.

"An indictment for the bribery of an officer or functionary of justice should allege the pendency and character of the suit or duty in which he was to be thereby influenced, with such averments as to show that the intent was to bribe him in respect to his official duties." 3 Ency. Pl. & Pr. 698. "Defendant's receipt of property embezzled.—It must be directly and positively alleged that the property came into the defendant's possession and was held by him by virtue of his being a servant, agent, bailee, trustee, or officer, as the case may be." 7 Ency. Pl. & Pr. 422. Extortion. "It is usual and probably indispensable to charge that the money was taken under color of office. And the indictment should state what the office was. Lack of the allegation that the money was extracted under color of office renders the indictment defective in substance, and this defect is not waived by pleading to the indictment or cured by verdict." 8 Ency. Pl. & Pr. 793. *State v. Oden*, 10 Ind. App. 136, was a prosecution against a county clerk for extortion. The indictment alleged that the moneys were received by the clerk for fees claimed to be due him in a certain action, but failed to charge that he demanded and received them in his official capacity. The court said: "The indictment under consideration wholly fails to show that appellee received the money as fees for the performance of any official duty, or in his official capacity. So far as the allegations of the indictment advise us, it may have been claimed by him for services as witness or juror in the case." In *Moore v. United States*, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. ed. 422, the indictment charged that the defendant "Moore, being then and there an assistant, clerk, or employe, in or connected with the business or operation of the United States post-office in the city of Mobile, in the state of Alabama, did embezzle the sum of ———, money of the United States, of the value of ———, the said money being the

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personal property of the United States". The indictment was held to be insufficient. "If the words charging the defendant with being an employe of the post-office be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since the defendant might be held for property received in a wholly different capacity—such, for instance, as a simple bailee of the government. * * * If, then, the indictment in this case had charged that the defendant, being then and there assistant, clerk, or employe, in or connected with the business or operations of the United States post-office in the city of Mobile, embezzled the sum stated, and had further alleged that such sum came into his possession in that capacity, we should have held the indictment sufficient".

Whether or not appellees received the money in their official capacity is left to conjecture. The indictment states that appellees were president and cashier of the bank; that the bank was insolvent, etc.; and that appellees received from The F. Wunderlich Company a certain sum of money as a deposit with the bank, etc. There is no averment that the money was received by them in their official capacity. Nor are there allegations from which such fact would follow as an inevitable conclusion. For aught that appears in the indictment, appellees may have received, at their homes, or on the street, the money of The F. Wunderlich Company as a deposit with the bank,—and the bank may never have received it. It may also be conjectured that the bank received the money through appellees as its officers. But accused persons are not to be arraigned on conjectures.

Judgment affirmed.

Dowling, J., took no part in this decision.

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MCCARTY v. KINSEY.

[No. 18,781. Filed April 18, 1900.]

PLEADING.—*Former Adjudication.*—The answer of former adjudication is not founded on the pleadings in the former suit, and it is not necessary to file with such answer a copy of the pleadings in the former suit as an exhibit. p. 447.

FORMER ADJUDICATION.—*Slander.*—*Superior Courts.*—*Jurisdiction.*—The Marion Superior Court has no jurisdiction of actions for slander, and a judgment for defendant in such court in an action for damages for assault and battery and slanderous words used by defendant during the altercation, will not constitute a bar to an action in the circuit court for slander. pp. 448-450.

From the Marion Circuit Court. *Reversed.*

F. W. Cady, for appellant.

J. S. Duncan, C. W. Smith, H. H. Hornbrook and *Albert Smith*, for appellee.

MONKS, J.—Appellant brought this action to recover damages for an alleged assault and battery committed by appellee upon the person of appellant, and for alleged slanderous words uttered by appellee of and concerning appellant at the time of the commission of said assault and battery, and as a part of the same transaction. Appellee filed an answer of former adjudication, to which appellant filed a demurrer for want of facts, which was overruled. Appellant refused to plead over, and final judgment was rendered against him.

The only error assigned calls in question the action of the court in overruling appellant's demurrer to the answer of former adjudication.

It is first insisted that the answer was insufficient because no copy of the pleadings in the former case was filed with said answer and made a part thereof. The answer of former adjudication is not founded on the pleadings in the former suit, and it is not necessary, therefore, to file with such answer a copy thereof as an exhibit. 1 Woollen's Tr. Proc.

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167	434

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§1858, and cases cited; *Campbell v. Cross*, 39 Ind. 155; *Allen v. Randolph*, 48 Ind. 496; *Wilson v. Vance*, 55 Ind. 584; *Richardson v. Jones*, 58 Ind. 240; *Mull v. McNight*, 67 Ind. 525; *McSweeney v. Carney*, 72 Ind. 430.

It is next insisted that said answer is insufficient because the Marion Superior Court, in which the former suit is alleged to have been tried and determined, had no jurisdiction of actions for slander. In this State superior courts have no jurisdiction of actions for slander. §1404 Burns 1894, §1351 R. S. 1881 and Horner 1897. It will be observed, however, that the action was brought to recover damages for assault and battery, and for slanderous words uttered at the same time and as a part of the same transaction. Superior courts have jurisdiction of actions to recover damages for assault and battery. §1410 Burns 1894, §1357 R. S. 1881 and Horner 1897. The language used by the parties during the altercation is admissible in evidence as a part of the *res gesta*. *Baker v. Gausin*, 76 Ind. 317.

In actions for assault and battery the plaintiff recovers damages not only for the physical and mental suffering caused by the injury, but also for the humiliation, degradation, shame, loss of honor and good name, and mental suffering, if any, caused by the assault and battery and the language used by the defendant during the altercation. *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Little v. Tingle*, 26 Ind. 168; *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Wolf v. Trinkle*, 103 Ind. 355, 357, and cases cited.

As the language used by the parties during an altercation may be given in evidence, and considered by the jury in determining the damages to be awarded, the mere fact that the language used was slanderous would not change the rule. Appellant having sued appellee in the Marion Superior Court to recover damages for assault and battery and slanderous words used by appellee during the altercation, that court had jurisdiction to try and determine the same as an

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action for assault and battery, treating the words uttered by appellee as a part of the transaction. The words used gave character to the act of assault and battery, and it was proper for the jury to consider them with all the circumstances in evidence, and the humiliation, degradation, shame and loss of honor, and mental anguish, if any, caused thereby, in determining the amount of damages. If, therefore, appellant had recovered judgment in the action in the superior court it may be, as insisted by appellee, that he would have been concluded thereby from maintaining this action; but it is alleged in said answer of former adjudication that the jury returned a verdict in favor of appellee, and judgment was rendered on the verdict in favor of appellee against appellant.

If upon the trial of said cause in the superior court the slanderous words alleged had been established by a preponderance of the evidence, yet if from any cause the evidence failed to show the assault and battery alleged, or under proper issues if the same was justifiable or excusable, appellant could not, as he did not, recover damages for the alleged slanderous words. *Ireland v. Emmerson*, 93 Ind. 1, 47 Am. Rep. 364. This is true for the reason that the superior court had no jurisdiction of actions for slander, and the assault and battery being the substantial cause of action, the slanderous words, if any, uttered during the altercation, could only be considered in estimating appellant's damages under the rule declared in the cases heretofore cited, if the assault and battery were established. The verdict and judgment against the appellant in said cause in the superior court, therefore, could, and did, only find and adjudge that the assault and battery alleged was not committed, or, if committed, that it was excusable or justifiable if the pleadings presented such issue, and adjudged nothing as to the speaking of the slanderous words, if any, uttered by appellant during the altercation. *Ireland v. Emmerson*, 93 Ind. 1, 47 Am. Rep. 364. It is clear that said judgment in

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favor of appellee in the superior court did not adjudge that the alleged slanderous words were or were not spoken, or if spoken that they were, or were not actionable, and appellant is not, therefore, estopped from maintaining an action therefor. It follows that the court erred in overruling appellant's demurrer to the answer of former adjudication.

Judgment reversed, with instructions to sustain the demurrer to said paragraph of answer, and for further proceedings not inconsistent with this opinion.

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[No. 18,188. Filed April 20, 1900.]

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CRIMINAL LAW.—*Discharge of Defendant for Delay in Prosecution.*—

A judgment discharging defendant from an indictment pending against her for failure of the State to bring the cause on for trial within the time prescribed by §1852 Burns 1894 will not be reversed on the ground that the time of the court was occupied in the trial of other causes, where it was shown that at least eight days of the third term after defendant was admitted to bail were occupied in the trial of civil causes.

From the Decatur Circuit Court. *Affirmed.*

T. B. Adams, Isaac Carter, K. M. Hord, E. K. Adams, E. E. Roland and W. A. Ketcham, Attorney-General, for State.

B. F. Love, H. A. Morrison, J. S. Duncan, C. W. Smith and H. H. Hornbrook, for appellee.

HADLEY, C. J.—This is an appeal from the order and judgment of the circuit court of Decatur county, discharging the appellee from an indictment theretofore pending against her in said court for the murder of Edward Kuhn, as well also as from the recognizance under which she was then held to appear in said court. This judgment was entered upon the petition of the appellee for her discharge, because of the failure of the State to bring the cause on for trial within the time prescribed by §1852 Burns 1894, §1783 R. S. 1881 and Horner 1897.

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The petition for discharge, filed February 10, 1896, shows that on the 20th day of January, 1895, an indictment was returned against the petitioner, by the grand jury of Shelby county, charging her with murder in the first degree; that thereupon the petitioner was arrested and imprisoned in the jail of said county; that thereafter the venue of said cause was changed to the Decatur Circuit Court, and the appellee was transferred to the jail of the last named county; that at the February term, 1895, she was put upon her trial, which trial resulted in a disagreement of the jury; that thereafter, at the same term of court, she was admitted to bail, and that said recognizance was yet in force; that three full terms of court had passed since said February term, 1895, namely, April, September, and November, 1895; that at all times since her being so admitted to bail, she had been ready and willing to go to trial upon said indictment, but no continuance of said cause has been had upon her motion, nor had the delay been caused by any act of hers; that at each of the terms of said court there had been more than sufficient time for said cause to have been tried.

The State filed an answer to said petition in three paragraphs: The first a general denial; the second averred that, after entering into such recognizance, the appellee had left the court room, and Decatur county, and had at no time since entering into such recognizance appeared in court and demanded a trial, wherefore it was claimed that she had waived her right to have said cause tried at one of the three terms; the third paragraph averred that each term of the court after the February term, 1895, the State had appeared by counsel in the circuit court of Decatur county, and requested and demanded of the judge that said cause be set down for trial, but that said court declined to set the said cause down for trial, giving as a reason that owing to the crowded condition of the docket of the court it would be impossible to try the cause for want of time; and that upon each occasion the defendant was present in court by her counsel, and made no objection to such continuance.

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To these affirmative answers the appellee replied by a general denial. The court, after considering the evidence offered in support of the petition and answers, ordered the discharge of the defendant from the indictment and recognizance; from which order and judgment the State appeals.

The abuses and crimes against personal liberty that preceded the granting of Magna Charta first found restraint in that famous document in these words: "No man can be rightfully imprisoned except upon a charge of crime properly made in pursuance of the law of the land; no man when so imprisoned upon a lawful charge, presented in a lawful manner, specifying the crime, can be arbitrarily held without trial." The spirit and principle of Magna Charta was carried into our federal Constitution, article six, in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial"; and also into our State Constitution, section twelve, bill of rights, in the words following: "Justice shall be administered freely and without purchase; completely and without denial; speedily and without delay."

Section 1852 Burns 1894, §1783 Horner 1897, follows: "No person shall be held by recognizance to answer an indictment or information, without trial, for a period embracing more than three terms, not including a term at which a recognizance was first taken thereon, if taken in term time; but he shall be discharged unless a continuance be had upon his own motion, or the delay be caused by his act, or there be not sufficient time to try him at such third term; and in the latter case, if he be not brought to trial at such third term, he shall be discharged."

This is the legislative provision for extending the guaranty of the Constitution to citizens under recognizance to answer a criminal charge. Section 1851 provides that the State shall not detain the defendant in jail more than two consecutive terms without trial unless the delay is requested by the defendant or caused by his act, or there is not suffi-

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cient time to try in said terms. Section 1853 provides that when an application for discharge has been made under either of the foregoing sections, if the court is satisfied that there is evidence for the State which can not then be had, and that diligent effort has been made to procure it, and there is good ground to believe it may be procured at the next term, the court may continue the cause to the next term; and if not then put to trial the defendant shall be discharged. These provisions express the legislative judgment of what constitutes a reasonable time for the State's preparation for trial, and marks the limit of the State's right to hold a defendant without trial. They relate to criminal proceedings, and must be strictly construed. The question of discharge is not a matter of discretion with the court beyond the bounds fixed by section 1853. When the prisoner brings his case within the limits of the statute, his right to a discharge becomes absolute. The courts seem united upon this point.

In *People v. Morino*, 85 Cal. 515, under a similar statute, it is said: "A party charged with a crime has the constitutional right to a speedy trial and the court has no discretionary power to deny him a right so important, or to prolong his imprisonment without such trial beyond the time provided by law. The statute is imperative. It was enough for the defendant to show that the time fixed by statute, after information filed, had expired, and that the case had not been postponed on his application." To the same effect see: *In re McMicken*, 39 Kan. 406, 18 Pac. 473; *Walker v. State*, 89 Ga. 482, 15 S. E. 553; *In re Garvey*, 7 Col. 502, 4 Pac. 758; *Ochs v. People*, 124 Ill. 399, 16 N. E. 662.

There is no pretense here that the case was postponed beyond three terms, or at any term, to procure the attendance of witnesses; and no claim that the evidence was not at all times available; but the appellant grounds its appeal upon the fact that there was not time sufficient at the November term to try the case "on account of the crowded condition

of the docket". The November term ran for five weeks,—thirty judicial days. The evidence shows that one or two days were occupied with probate business, nine or ten days with the trial of prisoners in jail under criminal charges, and about ten days in the trial of criminal cases against persons on bail, and that the balance of the term was occupied in the trial of civil causes. Section 408 Burns 1894, §405 Horner 1897, provides that it shall be the duty of circuit judges to arrange the order of business in their courts so as to provide (1) for the formation of issues and the transaction of probate business, (2) for the trial of criminal cases, and (3) for the trial of civil causes. In aid of the constitutional guaranty it is made the duty of the trial judge to give preference to criminal over civil cases, and a failure of the judge so to do can not be made to operate against the right of a defendant to trial within the limits of the statute.

As we have seen, upon failure to bring a defendant to trial under section 1852, within three terms after admission to bail, his right to a discharge becomes absolute, except as modified by section 1853, unless the delay is occasioned upon his own motion, or caused by his own act, or there is not sufficient time at such third term to try him. "And in the latter case, if he be not brought to trial at such third term, he shall be discharged." By the latter clause of section 1852, just quoted, is meant that the defendant must at least be brought to trial within such third term, and if it turns out that the trial can not be completed within the term, it may continue to completion beyond the term. At least eight days of the November term were occupied in the trial of civil causes. The prosecuting attorney testified that he did not at any time within the three terms request the court to set appellee's case down for trial, nor authorize any one else to do so, and it is reasonably certain that if the request had been made the trial could and would have at least been entered upon.

In her petition appellee avers that she never moved for a

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continuance; that no act of hers had delayed the trial from coming on, and that there was time at each term of the court for the trial. Upon the issues joined the court found from the evidence that these facts were true. The hearing was by the regular judge who had presided in the case in every step after it reached the Decatur Circuit Court, and who was distinguished for his fairness and judicial accuracy. We can not therefore disturb the finding and judgment. *McGuire v. Wallace*, 109 Ind. 284. Judgment affirmed.

PARROTT v. RICHARDSON.

[No. 19,185. Filed April 20, 1900.]

APPEAL AND ERROR.—*Evidence.*—A finding and judgment will not be disturbed on the sufficiency of the evidence where there was legal evidence fully sustaining the finding. *pp. 455, 456.*

SAME.—*New Trial.*—*Affidavits.*—*Record.*—No question is presented on an assignment in a motion for a new trial based upon newly discovered evidence, where the affidavits in support thereof are not made a part of the record by bill of exceptions or by order of court. *p. 456.*

From the Huntington Circuit Court. *Affirmed.*

M. L. Spencer and *W. A. Branyan*, for appellant.

L. L. Simons, *J. C. Branyan* and *J. S. Branyan*, for appellee.

MONKS, J.—Appellant sued appellee to recover a personal judgment against him for purchase money alleged to be due on the real estate described in the complaint, and to enforce an equitable lien therefor against said land. The case was tried by the court, and a general finding made in favor of appellee, and over a motion for a new trial judgment was rendered against appellant.

The only error assigned calls in question the action of the court in overruling appellant's motion for a new trial.

The first, second, and third causes for a new trial present the question of the sufficiency of the evidence to sustain the

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decision of the court, and whether the same is contrary to law. It is not claimed that there was not sufficient evidence, if true, to fully sustain the finding of the court, but the weight thereof and the credibility of the witnesses are argued by counsel for appellant in their brief. There was legal evidence which fully sustained the finding of the court, and, although there was evidence to the contrary, we cannot, under the well settled rule, disturb the finding of the court or verdict of a jury under such circumstances. *Schmidt v. Zahrndt*, 148 Ind. 447, 457; *Hoskinson v. Cavender*, 143 Ind. 1, 2; *Ewbank's Manual*, §46, p. 69; 2 *Woollen's Tr. Proc.* §4385.

The fourth cause assigned for a new trial is newly discovered evidence. No question is presented for our determination by said specification, for the reason that the affidavits filed in support thereof are not made a part of the record by a bill of exceptions or order of court. *Heltonville, etc., Co. v. Fields*, 138 Ind. 58, 66, 67, and cases cited; *Hoskinson v. Cavender*, 143 Ind. 1, and cases cited; 2 *Woollen's Tr. Proc.* §4430, and cases cited.

Finding no error in the record the judgment is affirmed.

FIRST NATIONAL BANK OF RICHMOND v. TURNER,
TREASURER.

[No. 19,251. Filed April 20, 1900.]

TAXATION.—National Bank Stock.—Deduction of Indebtedness of Shareholder.—The owner of stock in a national bank is not entitled to a deduction of his *bona fide* indebtedness from the assessed valuation of his stock for the purpose of taxation.

From the Wayne Circuit Court. *Affirmed.*

J. S. Reeves, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley* and *P. J. Freeman*, for appellee.

BAKER, J.—Appellant sought to enjoin appellee from collecting certain taxes, alleged to be illegal and excessive.

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The complaint alleges in substance that appellant is a duly incorporated national bank, doing business at Richmond, having a capital of \$150,000 divided into shares of \$100; that appellee is the county treasurer; that appellant made out a return for taxation for 1899, and the assessor valued the shares at \$80 each; that certain persons owned shares and were indebted in various sums in excess of the amount of credits from which their debts could be deducted; that the debts were for consideration received; that each of these shareholders demanded of the assessor that his *bona fide* indebtedness be deducted from the assessed value of his stock; that the assessor, the auditor and the county board of review refused to allow such deductions to be made, and the auditor computed the State and county taxes for 1899 upon the full assessed valuation, and delivered the tax duplicate to appellee; that all taxes rightfully due upon these shares have been paid, that is, the taxes upon the difference between the assessed valuation and the shareholders' *bona fide* indebtedness; that the unpaid balance is illegal and excessive; that appellee, unless restrained, will proceed to collect the balance by levy and sale. To this complaint, a demurrer for want of facts was sustained; and appellant refused to plead further. The error assigned involves the sufficiency of the complaint.

Without the sanction of the United States Congress, no state legislature could include national bank stock within the subjects of taxation. The necessary authority is found in §5219 R. S. U. S., which reads: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not

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be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

In *Wasson v. First National Bank*, 107 Ind. 206, decided June 25, 1886, this court held that the assessed valuation of national bank stock was subject to deductions for *bona fide* debts of the shareholder. The court was governed by its understanding of the construction of §5219 R. S. U. S. as given in *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053, decided April 3, 1882. In the *Wasson* case, page 213, it was said: "Were we at liberty to place our own construction upon the act, we should be very strongly inclined to hold that 'moneyed capital', as therein used, has reference to capital invested, as an investment for profit, whether in bonds, stocks, money loaned, or otherwise, and not to debts due to the taxpayer, growing out of the ordinary affairs of business life. Such, substantially, is the dissenting opinion of Chief Justice Waite, concurred in by Justice Gray, in the case of *Evansville Bank v. Britton*, 105 U. S. 322. The court in that case, however, adopted a different construction, and it is the duty of this court, as it is the duty of all state courts, to follow the construction placed upon the act by that court."

In *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. ed. 895, decided April 4, 1887, the Supreme Court declared that "The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the

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treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the states in which they were located without the consent of Congress, being exempted from the power of the states in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the states the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the states from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and

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unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy. * * * Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the states. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital'. Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress."

And in *First National Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. ed. 669, decided February 27, 1899, it was affirmed that "The main purpose of Congress in fixing limits to state taxation on investments in national banks was to render it impossible for the state in levying such a tax to create and fix an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light

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of this policy. 'Moneyed capital' does not mean all capital the value of which is measured in terms of money, neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies and other corporations are represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation; but the property of the corporation which constitutes this invested capital may consist mainly of real and personal property which, in the hands of individuals, none would think of calling moneyed capital, and its business may not consist in any kind of dealing in money or commercial representatives of money. This statement is taken from *Mercantile Bank v. New York*, 121 U. S. 138, 155, 7 Sup. Ct. 896, 30 L. ed. 895. That case has been cited with approval many times, especially in *First National Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412, 40 L. ed. 573, and in *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. ed. 1069. The result seems to be that the term 'moneyed capital,' as used in the federal statute, does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the federal statute."

In coming to an understanding of the phrase "moneyed capital", it may be well that the meaning of "capital" be determined. An acceptable definition is found in *Bailey v. Clark*, 21 Wall. 284, 286, 22 L. ed. 651: "When used with respect to the property of a corporation or association the term has a settled meaning; it applies only to the property or means contributed by the stockholders as the fund

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or basis for the business or enterprise for which the corporation or association was formed. As to them the term does not embrace temporary loans, though the moneys borrowed be directly appropriated in their business or undertakings. And when used with respect to the property of individuals in any particular business, the term has substantially the same import; it then means the property taken from other investments or uses and set apart for and invested in the special business, and in the increase, proceeds or earnings of which property beyond expenditures incurred in its use consist the profits made in the business. It does not, any more than when used with respect to corporations, embrace temporary loans made in the regular course of business. As very justly observed by the circuit judge, 'It would not satisfy the demands of common honesty, if a man engaged in business of any kind, being asked the amount of capital employed in his business, should include in his reply all the sums which, in the conduct of his business, he had borrowed and had not yet repaid.' " Under the authority of *Mercantile Bank v. New York*, 121 U. S. 138, and *National Bank v. Chapman*, 173 U. S. 205, it would seem that "moneyed capital" is capital (as defined in *Bailey v. Clark*, *supra*,) employed in a business in which the stock in trade, from the dealings in which profits are expected to accrue, is money, including in that term absolute money, legal substitutes for money, and commercial representatives of money.

Is national bank stock subjected by the laws of this State to taxation "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens"? Under the laws of this State, national bank stock is considered as "moneyed capital in the hands of individuals". The individual is treated as being entitled to his proportion of the credits of the bank less his proportion of the debits of the bank, and the difference is determined to be the "moneyed capital" in his hands. Similarly, state bank stock is considered as "moneyed capital in the hands of individuals".

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The individual is treated as being entitled to his proportion of the credits of the bank less his proportion of the debts of the bank, and the difference is determined to be the "moneyed capital" in his hands. Acts 1891, pp. 199, 220, §§60, 61, §§8470, 8471 Burns 1894, §§6328, 6329 Horner 1897. In both cases, the statute requires that "In making such statement of the true cash value of such shares, the credits shall be given and the *bona fide* indebtedness of such bank deducted therefrom, as in the case of individuals". The private banker or broker "who shall keep an office or other place of business, and engages in the business of lending money, receiving money on deposit, buying or selling bullion, bills of exchange, notes, bonds, stocks or other evidences of indebtedness, with a view to profit", is assessed in the same spirit, but necessarily by a different letter as there are no "shares". Section 59 of the tax law of 1891, as amended in 1895 (Acts 1895 p. 29, §8469 Burns 1894, §6327 Horner 1897), provides for a detailed return of the assets and liabilities of the business, and taxes the difference as the "moneyed capital" employed in the business. The statute is essentially the same as the Ohio statute, of which it was said in *National Bank v. Chapman*, 173 U. S. 205: "Under the Ohio law the shares in national and also in state banks are what is termed stocks or investments in stocks, and are not credits from which debts can be deducted. As between the holders of shares in incorporated state banks and national banks on the one hand, and unincorporated banks or bankers on the other, we find no evidence of discrimination in favor of unincorporated state banks or bankers. In regard to this latter class, there is no capital stock so-called, and section 2759 of the revised statutes therefore makes provision, in order to determine the amount to be assessed for taxation, for deducting the debts existing in the business itself from the amount of moneyed capital belonging to the bank or banker and employed in the business, and the remainder is entered on the tax book in the name of the bank or banker, and taxes assessed thereon. This does not give the unincorporated bank or banker the right to deduct

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his general debts disconnected from the business of banking and not incurred therein from the remainder above mentioned. It cannot be doubted that under this section those debts which are disconnected from the banking business cannot be deducted from the aggregate amount of the capital employed therein. The debts that are incurred in the actual conduct of the business are deducted so that the real value of the capital that is employed may be determined and the taxes assessed thereon. This system is, as nearly as may be, equivalent in its results to that employed in the case of incorporated state banks and of national banks". The Nebraska statute, considered in *Bressler v. County of Wayne*, 32 Neb. 834, 49 N. W. 787, 13 L. R. A. 618, is also similar: "The fact that the unincorporated bank is entitled to such deduction is no valid reason why the debts of the owner of national bank stock should be deducted from the value of his shares in assessing them. National banks are assessed solely by taxing the shares of stock. In unincorporated banks there are no shares to tax, and the legislature, of necessity, was compelled to adopt a different method of taxing them by assessing the value of the capital therein invested, which is practically the difference between the value of the assets and the amount of liabilities. The shares of a national bank do not represent the assets of the bank, but rather the difference between the value of its property and its liabilities. While the method of assessing national banks is different from that by which a private bank or banker is assessed, the rule of uniformity is preserved, so that it can not be said that the law of the state requires that national banks shall be taxed at a greater rate than is imposed upon the capital invested in the state banks." So it appears that this State has made clear provisions that all of the "other moneyed capital" that is openly employed in business competitive with that of national banks shall be taxed the same as "moneyed capital" invested in national bank shares.

Under §53 of the tax law of 1891, as amended in 1899

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(Acts 1899 p. 491), the individual taxpayer may deduct his *bona fide* indebtedness from his credits consisting of annuities, bonds, notes secured by mortgage, other notes, accounts, and other amounts due him except for money on deposit. Article 10, §1, of the Constitution of this State commands that "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal." In *Flower v. Sheridan*, 137 Ind. 28, 41, 23 L. R. A. 278, this court said: "The legislature had a right, under its provisions, to equalize these burdens by a regulation which would tend to secure a just valuation. The plan adopted was to ascertain the just value of the credits after deducting the indebtedness. Credits are, by the Constitution, property, and as such are to be taxed. Their just value is to be ascertained by subtracting the *bona fide* indebtedness from the gross amount of the notes, accounts and other choses in action, and the balance is to be returned as belonging to the individual. Surely, the difference thus found is the precise amount and just value of the credits of the party in the legal and proper sense of the term. Section 1, article 10, *supra*, does not say the gross amount of all notes, accounts, and other choses in action shall be taxed, and we can not so construe it without perverting its language and obvious meaning. Consider for a moment its practical operation under such a construction. A has an account against B for \$1,000, or a debt against him for a like amount, evidenced by a promissory note. B holds an account or promissory note, evidencing a *bona fide* indebtedness against A for the same sum of money. Equity, except where one of the parties is insolvent, treats these claims as compensating each other. Neither owes nor could recover, in an action, against the other, and yet, if appellant's theory is right, \$2,000 must be placed upon the tax duplicate, because the holders never met and settled or surrendered their claims. In such case,

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each is a chose in action held by the party to whom it belongs, and must, under the contention of counsel, be returned to the assessor, and yet it is obvious that neither, as against the other, has a penny of credit, either in money or just value. If the owner is taxed upon such credit it is upon fiction. The tax duplicate, in this way, would be increased, but not from property of value in the State. We think the Constitution requires that property, wealth, substantial values, shall be taxed, but not imaginary values. As against an insolvent maker, the true value in money of the credit can only be taxed and so it is where a man has both credits and debts, if there is no balance there is no sum of money due, however large the items of account upon each side may be. The items of credit upon the one side are of no value, as far as they are balanced by the debts upon the other side. If the balance is in favor of one creditor this is the exact sum of money due him as against all others, and it is the true value of his credits. Deductions and exemptions are two separate and distinct things, having no connection." The tax law of this State is intended to operate uniformly and to reach values, not amounts. It is only on the theory that credits are not necessarily capital that any deductions are allowable under our Constitution. It is not judicially known to this court what proportion of the gross amount of credits in this State, specified in §53 of the tax law, is "capital" in the hands of individual citizens; nor, if any of it is "capital", that an appreciable portion, or any at all, is "moneyed capital" employed outside of national, state and private banks, by individuals in competition with national banks.

In considering our present tax law in the light of recent decisions of the Supreme Court of the United States, the case of *Wasson v. First National Bank*, 107 Ind. 206, is not controlling.

Judgment affirmed.

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[No. 18,998. Filed April 27, 1900.]

MUNICIPAL CORPORATIONS.—*Street Improvements.—Constitutional Law.*—The imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the fourteenth amendment to the federal Constitution. pp. 468-477.

SAME.—*Street Improvements.—Constitutional Law.*—The legislature may create, or authorize the municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality. p. 478.

SAME.—*Street Improvements.—Constitutional Law.*—The legislature may declare conclusively that only the property within the taxing district created for local improvements shall be specially assessed on account of the improvements within the district. p. 478.

SAME.—*Street Improvements.—Constitutional Law.*—Each parcel of contributing property in a taxing district may be assessed for street improvements only to the extent that it actually receives special benefits. p. 478.

SAME.—*Street Improvements.—Constitutional Law.*—The taxing district as a whole may be assessed for street improvements only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. p. 478.

SAME.—*Street Improvements.—Constitutional Law.*—A street improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury. p. 478.

SAME.—*Street Improvements.—Constitutional Law.*—Property owners affected by a street improvement within a taxing district are entitled to a hearing on the question of special benefits. p. 478.

SAME.—*Street Improvements.—Assessments.*—Section 4290 Burns 1894 provides a rule of *prima facie* assessments in street and alley improvements, which assessments are subject to review and alteration by the common council under the provisions of §4294 upon the basis of special benefits received from the improvement, and common councils not only have the power, but it is their imperative duty to adjust the assessments to conform to the actual special benefits accruing to each of the abutting property owners. pp. 478-491.

SAME.—*Street Improvements.—When Assessments Exceed Benefits.*—Where in adjusting assessments for street improvements it is found

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that the total cost of the improvement exceeds the total sum of special benefits accruing therefrom the deficit must be provided from the general revenues of the city under §4299 Burns 1894. pp. 491-493.

MUNICIPAL CORPORATION.—Street Improvements.—A street improvement resolution requiring the space between the sidewalk and curb to be graded with rich dirt and sodded at the expense of the abutting property owners is void. pp. 493-495.

INJUNCTION.—Street Improvements.—Resolution.—Void in Part.—Where part of a street improvement resolution is void as being *ultra vires*, an injunction should be granted against so much of the proposed improvement as is illegal. p. 495.

From the Shelby Circuit Court. *Reversed.*

T. B. Adams, Isaac Carter, B. F. Love and H. C. Morrison, for appellant.

D. L. Wilson, W. A. Yarling, A. E. Lisher, J. Chez, B. K. Elliott, W. F. Elliott, F. L. Littleton, Nelson & Myers and McConnell & Jenkins, for appellee.

HADLEY, C. J.—Appellant brought this suit to restrain appellee from improving a street on which he owned an abutting lot.

Shelbyville has less than 10,000 inhabitants, and the proceedings for the proposed improvement were instituted under the statute commonly known as "the Barrett law", §§4288-4298 Burns 1894, §§6771-6780 R. S. 1881 and Horner 1897. On August 2, 1898, the common council, without any petition from the owners of the property affected, passed a resolution declaring a necessity for the improvement, the same to be executed as follows: "There shall be set and erected a curb of oolitic stone four inches thick, twenty inches wide, and not less than five feet in length, to be set twenty-two feet from the lot line outward, set to grade, set on a good bed of sand four inches thick, and to be dressed so that when set and completed the part of curbing that is exposed will show as dressed; the joints all to fit neat and smooth and make close connection; and the space between the brick sidewalk on said part of said street shall be filled with good rich dirt, and properly graded and made smooth, and when grade is made to be covered with good

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live fresh sod, to be on grade with the curbing and the brick sidewalk, * * * and that the cost and expense thereof, including advertising, labor, and material for the same, be assessed against the property on the line, and collected according to the provisions of an act of the General Assembly of the State of Indiana approved March 8, 1889, and amendments thereto", and that notice should be given by publication that the common council, on August 30, 1898, at their chamber, would receive sealed proposals for the execution of the work, and would hear property owners' objections to the necessity for the construction thereof.

On August 26, 1898, appellant filed his complaint stating the foregoing facts, and alleging that the street to be improved is 100 feet wide, and the proposed widening of the sidewalks to twenty-two feet on each side will reduce the roadway to about fifty-five feet; that the making of said improvement will cost about \$1 per lineal foot, which it is proposed the abutting property owners shall pay; that it will inconvenience the plaintiff and other property owners, and make their property less valuable because of the inconvenience in getting to and from the traveled roadway; that it will be of no benefit to the plaintiff, and damage him \$100. The sustaining of a demurrer to the complaint for want of facts is the only error assigned.

Counsel, in the introduction of their respective briefs, epigrammatically state the principal issue in this court thus: "Is the 'Barrett law' law?" "The 'Barrett law' is law." "The 'Barrett law' is not law."

We will not stop now to inquire whether the demurrer to the complaint should have been overruled for a minor cause, since the appellant, as indicated by his argument, has based his appeal principally upon the question of the statute's constitutionality; and for the present the complaint will be taken as admitting that the city intends to proceed in accordance with the provisions of the statute. Appellant's contention is that the statute, in violation of the federal and

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State Constitutions, provides for the taking of property without just compensation, and without due process of law. Two propositions are involved: (1) Is the method of assessing the whole cost of a street improvement upon the abutting property equally by the frontage, irrespective of accruing benefits and damages, constitutional? (2) Is that the method required by the Barrett law?

Many of the courts of this country have answered the first question in the affirmative. Cooley on Taxation (2nd ed. 1886), p. 644, says: "In many instances where streets were to be opened or improved, sewers constructed, water pipes laid, or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing some proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits; and making that the standard, to apportion the benefits accordingly. Such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it can not be denied that in the case of some improvements, frontage is a very reasonable measure of benefits; much more just than value could be; and perhaps approaching equality as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment."

In his treatise on municipal corporations, published in 1890, Dillon gives an extended review of the subject, and notes that the courts are very generally agreed that the authority to require property specially benefited to bear the expense of local improvements is embraced within the taxing power, and that a statute authorizing municipal authorities to make such improvements and assess the cost in proportion to the frontage, in the absence of some special constitutional restriction, is a valid exercise of the power of taxation, and

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according to the weight of authority is considered to be a question of legislative expediency. §§752-761 (4th ed.). And, as upholding the doctrine of the majority, the author notes (§760) that the Supreme Court of the United States holds that state laws imposing upon property, according to legislative discretion, the cost of local improvements, do not deprive the owner of his property without due process of law within the meaning of the fourteenth amendment. *Davidson v. City of New Orleans* (1877), 96 U. S. 97, 104, 24 L. ed. 616; *County of Mobile v. Kimball* (1880), 102 U. S. 691, 26 L. ed. 238; *Hagar v. Reclamation District* (1883), 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569; *Wurts v. Hoagland* (1884), 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. ed. 229; *Walston v. Nevin* (1888), 128 U. S. 578, 9 Sup. Ct. 192, 32 L. ed. 544. To which may be added: *Spencer v. Merchant* (1887), 125 U. S. 345, 8 Sup. Ct. 921, 31 L. ed. 763; *Williams v. Eggleston* (1898), 170 U. S. 304, 311, 18 Sup. Ct. 617, 42 L. ed. 1047; *Parsons v. District of Columbia* (1898), 170 U. S. 45, 18 Sup. Ct. 521, 42 L. ed. 943.

The author, however, after considering many cases *pro* and *con*, and summing up the general principles underlying special assessment, in his eighth conclusion (§761), affirms what he conceives to be the only true rule upon principle as follows: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the

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legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the states. But since the period when express provisions have been made in many of the state constitutions, requiring *uniformity and equality of taxation*, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

Among the many cases cited by the author in support of his conclusion is *Tide-water Co. v. Coster*, 18 N. J. Eq. 518, where it is said on page 527: "Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree, be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burthen; when that which is received by the landowner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such

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an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest; the owners of these waste lands have a special concern in such improvement, so far as their lands will be in a peculiar manner benefited; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act, is the public benefit: how, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public, to be laid in the form of a tax upon certain persons, who are designated, not indeed by name, but by their description as the owners of certain lands."

In the recent case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. ed. 443, filed December 12, 1898, the Supreme Court of the United States seems to have abandoned its former rulings and to have adopted what Dillon announces as the only true rule upon principle. In that case the court said: "The particular question presented for consideration involves the validity of an ordinance of that village [Norwood] assessing upon the appellee's land abutting on each side of the new street an amount covering not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings"; and "the present appeal was prosecuted directly to this court, because the case involved the construction and application of the Constitution of the United States."

Under a statute of Ohio the council was authorized to assess the cost and expenses of street improvement "by the

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front foot of the property bounding and abutting upon the improvement. Under this statute the village passed an ordinance providing that all costs and expenses of the condemnation and opening proceedings should be assessed 'per front foot upon the property bounding and abutting on that part of Ivenhoe avenue as condemned and appropriated herein'".

The real question presented by the facts is thus stated by the court: "Does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?"

In answering the question the court say: "The power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that

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such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement, in substantial excess of the special benefits accruing to him, is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

After reviewing many authorities and italicizing what Dillon affirms as the true rule, the court concludes: "It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost."

And further: "As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

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Again: "The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the Constitution, in that the entire cost of the street improvement was imposed upon the abutting property, by the front foot, without any reference to special benefits."

An assessment for such improvement, to be in conformity with the opinion, is thus stated: "That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

The final judgment of the court follows: "The judgment of the circuit court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

While the facts in the Norwood-Baker case are unusual, and distinguishable from the facts in the case at bar, yet it can not be successfully denied that the general doctrine laid down is to the effect that the imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the fourteenth amendment to the federal Constitution; and that the case has been so construed generally by the courts of the country. See *Loeb v. Trustees of Columbia Tp.* (C. C. S. D. Ohio), 91 Fed. 37, January 9, 1899, involving the validity of assessments laid by a township upon abutting property for the improvement of a road; *Fay v. City of Springfield* (C. C.

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S. D. Mo.), 94 Fed. 409, May 9, 1899, street paving assessments against abutters; *Sears v. Street Commissioners*, 173 Mass. 350, 53 N. E. 876, May 18, 1899, sewer assessments upon a particular class of property; *Hutcheson v. Storrie*, 92 Texas 685, 51 S. W. 848, 45 L. R. A. 289, June 19, 1899, street paving assessments upon abutting property; *Schroder v. Overman* (Ohio St.), 55 N. E. 158, October 24, 1899, street pavement and sewer assessments against abutters; *Charles v. City of Marion* (C. C. Dist. Ind.), 98 Fed. 166, December 11, 1899, street paving assessments against abutters.

The judgment of the federal Supreme Court defining the limits of legislative power, sanctioned by the federal Constitution, is the supreme law of the land. It commands state courts as well as state legislatures. The duty thus imposed is agreeable as being in accord with our sense of just principles, and as furnishing the only reasonable foundation for the exercise of the taxing power in respect to special assessments.

Streets are public highways which all inhabitants of the municipality have an equal right to use and by the improvement of which all are in a measure benefited. There is much justice in holding that a sum equal to the special benefits, that is, such benefits as are not shared by the citizens generally, conferred upon the abutters may be exacted for application to the costs of the improvement; for when the corporation takes only so much as it returns in the way of enhanced values and increased personal comfort, the property owner is not injured; but when he has thus contributed his special benefits as to the remainder of the costs he stands as any other citizen. This remainder represents the price to the public for its general benefits, and when exacted from the abutters is but the taxation of a class for public benefit, and clearly a taking of property for public use without just compensation.

We conclude, therefore, that the principles applicable to

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assessments for local improvements are these: *The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality; the legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district; each parcel of contributing property may be assessed only to the extent that it actually receives special benefits; the taxing district as a whole may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property; the improvement so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury; property owners affected by an improvement, within a taxing district, are entitled to a hearing on the question of special benefits.*

It remains to be seen if the Barrett law denies any of these principles.

Whether the answer shall be for the appellant or the appellee depends upon two considerations namely: (1) Does the Barrett law require that the costs of street and alley improvements shall be assessed against abutting property by the front foot rule, without regard to the question of resulting benefits? (2) Do the provisions of the Barrett law supply to affected property owners due process of law within the meaning of the State and federal Constitutions?

In arriving at the true interpretation of the statute it is useful for us to review the legislative and judicial history of the State and country prior to the enactment of the Barrett law in 1889.

Dillon and Cooley class Indiana as one of the majority states upholding the doctrine that it is competent for the legislature to conclusively declare that the total cost of a local improvement shall be assessed equally against the frontage; and such classification was not without warrant. In 1852, the right to confer authority upon municipal offi-

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cers so to provide for street and other improvements, was first asserted by the legislature as a general law. R. S. 1852, p. 217. It was reasserted in 1857 (Acts 1857, p. 53), and again in 1865 (Acts 1865, S. S. p. 29), and again in 1867 (Acts 1867, p. 66), and again approved in 1881, §3163 R. S. 1881. The right to enforce such assessments was recognized by this court in 1861, *Indianapolis v. Imberry*, 17 Ind. 175, and in many subsequent decisions. The constitutionality of such legislation was never called in question until 1868, when it was assailed on the ground only that the same was in violation of the State Constitution requiring the rate of assessment and taxation to be uniform and equal. Such legislation was then and subsequently upheld as against such objection. Art. 10, §1, State Constitution; *Goodrich v. Turnpike Co.*, 26 Ind. 119; *Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329; *Law v. Turnpike Co.*, 30 Ind. 77.

But the constitutional question of due process of law, and the taking of property for public use without compensation, in the making of local improvements, within the meaning of the fourteenth amendment to the federal Constitution, seems never to have been previously considered by this court, so far as we have observed. Hence no ground exists to justify the insistence that the determination by this court, under former street improvement laws, of the constitutional question now involved, has been carried into the enactment of the statute in controversy.

It should be noted that prior to 1889 no provision was found in any of the laws entitling property owners to a voice upon the necessity for the improvement, or to a hearing of any kind upon the acts of the assessing officers, or to be heard upon any subject touching the improvement, until after the issuance of a precept for the sale of their property for the payment of the assessment, and then only as to the regularity of the proceedings subsequent to the making of the contract for the improvement. As the law had stood for

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thirty-seven years, when the Barrett law came up for consideration in the Assembly of 1889, municipal officers had the power, with a two-thirds vote of the council, to order an improvement, however costly and however unnecessary and oppressive, without regard to the wishes of the citizens, and proceed to charge the abutters with the total cost by the frontage rule, irrespective of any consideration of benefits, and thus, in some instances, impose upon the citizen an absolute confiscation of property without any form of hearing in its defense, further than to require it to be done orderly, and according to prescribed rule. For some reasons the people had become dissatisfied with the law, as it existed, upon the subject. In what respects may be best judged from the character of the changes that were made. It is evident that the discontent did not arise from the method of frontage assessments, as a rule, for that principle had been consistently maintained in every enactment since 1852, and was carried into the Barrett law. Besides, in most cases the rule is as just and equitable as any that may be devised. In the light of thirty-seven years' experience, however, it was doubtless manifest to the lawmakers that in some instances municipal officers, by reckless and inconsiderate acts, without testing public opinion, had involved citizens in heavy and unnecessary burdens by improvements; and that it was to them equally clear that all property bordering upon a municipal highway was not affected in the same way by an improvement of the latter; that in some cases the grade may be so raised or lowered as to most seriously impair the use and value of the property; in others, that some property may be situate upon a general level, highly improved, and in a business part of the city, while others upon the same street may be remote from business, lying low, and near a water-course, and practically worthless for business or residential purposes; in others, some abutting lots may be twenty feet, and others 200 feet, deep. It seems, therefore, reasonable to presume that the mischiefs resulting from the acts of

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reckless officials, and the common but exceptional cases of injustice and hardship flowing from the uniform and rigid application of the front-foot rule, were brought to the attention of the legislature, and that their avoidance was a purpose entering into the structure of the new law. *Quill v. City of Indianapolis*, 124 Ind. 292, 295, 7 L. R. A. 681. This much is certain, that, for reasons deemed sufficient, new and important provisions were incorporated into the new law—provisions contained in no previous law upon the subject.

The first of these is §2 Acts 1889, p. 237, §4289 Burns 1894, and is as follows: "Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town is located. Said notices shall state the time and place, when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof."

It is argued that this section affords the property owner no remedy beyond the right to advise the council with respect to the necessity for the improvement; and so it has been held by this court. *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681. But it does not follow that no benefit is to flow to the property owner from the observance of this provision. Municipal officers are elective, and, as a rule, in dealing with corporation affairs, will give respectful heed to the popular judgment of their constituents. This

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provision removes all power from the common council to impose burdens upon private property unawares the owner. It requires public notice to be given of the character and location of the proposed improvement for twenty-four days from the first publication, a length of time sufficient to develop public opinion advisedly, and at a fixed time and place, and before making a contract, the council shall hear those along the line upon the subject of the improvement; and it may reasonably be expected that if the property owners shall be able to show that there exists no necessity for such improvement, or that it will cost more than the accruing benefits, well meaning officers will be controlled by such showing and advice, as readily as by the positive mandate of a statute. It was not intended by this section to deprive the common council of the power of ordering the improvement irrespective of the advice of the property owners, but its purpose is to provide, in all cases, that they shall act advisedly and with deliberation.

The second and most important new provision is found in sections six and seven, Acts 1889 (the latter section, as amended, Acts 1891, p. 324, Acts 1899, p. 63), sections 4293, 4294 Burns 1894, which follow:

Section 4293. "When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city, or the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city, or the board of trustees of such town shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching such improvement: *First.* The total cost of said improvement. *Second.* The average cost per running front foot of the whole length of that part of the street or alley so improved. *Third.* The name of each property owner on that part of the street or alley so improved. *Fourth.* The number of front feet

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owned by the respective property owners on that part of said street so improved. *Fifth.* The amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively. *Sixth.* The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. *Seventh.* In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair proportion of the cost of such sewer according to the benefits conferred thereby, that should be assessed against such lot or part of a lot.

"Upon the filing of the report provided for in the last preceding section, the common council of such city, or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where, a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of such city, or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town, and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the sev-

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eral amounts which shall be assessed for and on account of such improvement."

It will be noted that section six provides that after completion of the work the engineer shall report certain facts to the council—not make an assessment of the costs; that when such report is lodged with the council it shall give two weeks' public notice of a time and place, when and where a *hearing* can be had upon the facts reported by the engineer, before a committee appointed by the council to *consider* such report, and such committee shall, after a consideration of the report, recommend to the council the adoption or alteration of the same. And any person feeling aggrieved by such report shall have the right to appear before the committee and *present objections* thereto, *and shall be accorded a hearing thereon*, and the further right to carry his objections to the common council where he shall also be accorded a hearing. After the hearings and objections are disposed of, the common council may adopt, alter, or amend the report and the assessments thereon, "and shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement."

It is contended that the statute limits the hearing before the committee and common council to errors of the engineer in stating the facts required of him, and that the power of the council, with respect to the report, is exhausted when it has verified such facts. We are unable to approve such construction. Section six requires that the engineer shall report certain facts to the council; that is to say, report such facts *correctly*; nothing short of a correct report is a compliance with the statute. We must view the subject as if the lawmakers assumed that the engineer would do his duty and that when he submitted his report to the council it accurately stated the facts required of him. Besides, will it be seriously contended that if, by inadvertence, errors crept into the report, the engineer, or even the council, at any time before

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final action thereon, did not have full power to correct it? *Ball v. Balfe*, 41 Ind. 221, 225. What reason, then, could there be for the legislature to deem it expedient to provide express authority in the council to correct, or cause to be corrected, errors in a report where none were reasonably supposed to exist, and where the power of correction would exist by irresistible implication? We may not attribute insincerity and dissembling to the legislators. We must believe that they meant something by these provisions beyond that granted by the old law, or why change it? The old law had been found efficient and authorized by the Constitution.

In the search for legislative intent "the court will look to each and every part of the statute; to the circumstances under which it was enacted; to the old law upon the subject, if any; to other statutes upon the same subject, or relative subjects, whether in force or repealed; to contemporaneous legislative history, and to the evils and mischiefs to be remedied." *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, 460; *Reynolds v. Bowen*, 138 Ind. 434, 449; *Goodwin v. State*, 142 Ind. 117, 121.

The common council shall give two weeks' notice of a time and place when their committee shall consider the report and hear grievances. In drainage and other assessment proceedings, it is provided that the commissioners shall inquire into certain facts, assess benefits and damages, and "make report to the court; and the court shall fix a time for hearing the report", and, after ten days' notice of the filing thereof, those affected by the report may appear and remonstrate. §§5624, 5625 Burns 1894.

It is even doubtful that the consideration of the report required of the committee, and the hearing they shall give thereon, relate to any other subject than the *proposed* assessments, or allotments of the cost of the improvement? After such hearing and consideration the committee is required to report their recommendations to the common council, and

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the council, being thus advised, and upon further hearing of objections, may adopt the report as made by the engineer, distributing the total cost equally per front foot, or it may alter the report and the assessments therein; and when the conclusion of the council is reached, it shall assess against the several lots and parcels of ground the several amounts which shall be assessed on account of such improvement. The mandate of the statute, following the hearings, that the council shall assess the several amounts against the several parcels, clearly indicates the particular subject to be previously considered by the council and its committee. From the term "hearing" is necessarily implied the power to administer some adequate remedy.

The council may alter the assessments, that is, as indicated by the engineer's report on the front-foot rule. "Alter" is to "make otherwise". Webster's Int. Dict.

From these considerations we are unable to resist the conclusion that, upon the hearing provided in section seven, the common council have power to change assessments from the frontage rule in such cases as they may deem just. That the legislature may confer upon municipal officers the power to adjust special benefits accruing from such improvements to a fair and just basis, is well settled; *Garvin v. Daussman*, 114 Ind. 429, 435; *Kizer v. Town of Winchester*, 141 Ind. 694, 696; and the speedy and ample remedy afforded by this view of the statute is consistent with the spirit of the act and the nature of such improvement, which public convenience requires to be accomplished in the shortest practical period, as said in *Garvin v. Daussman*, *supra*, page 436: "It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way."

An assessment is the "adjusting of the shares of a contribution by several towards a common beneficial object accord-

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ing to the benefit received". Bouvier's Law Dict.; Anderson's Law Dict.

From the power to alter is necessarily implied the power to add to or diminish. The absence of an express rule for guidance in the exercise of the power to alter does not impair it. It is sufficient if the power to change the assessment from the frontage rule exists. "It is a well affirmed principle that where a power is conferred by a statute, everything necessary to carry out the purpose of the power conferred and make it effectual and complete will be implied." *Conn v. Board, etc.*, 151 Ind. 517, 525; Sutherland's Stat. Con. §§340 and 341. Such implied power, however, will not authorize the employment of means and methods which may spring from the whims and caprices of administrative officers, according to varying circumstances, but will only permit the use of such reasonable, uniform, and consistent modes and measures as are calculated to accomplish the purpose in the spirit designed. How the power may be exercised in this instance must be determined from the spirit and scope of the whole act, of which said section seven is a part, as aided by the spirit, and principle running through other legislation upon the same and kindred subjects. Sutherland's Stat. Con. §288.

In an act relating to the opening and improvement of streets, §3633 Burns 1894, §3170 R. S. 1881 and Horner 1897, commissioners are commanded to make assessments on the basis of actual benefits. The same rule is required in drainage and free gravel road proceedings, §5658 Burns 1894, §4288 R. S. 1881 and Horner 1897, Acts 1869, p. 74. And this court has consistently held for thirty years that special benefits are the only foundation for special assessments. *City of New Albany v. Cook*, 29 Ind. 220; *Ross v. Stackhouse*, 114 Ind. 200; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, 465.

The published notice calls attention of all persons affected

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that the report of the engineer is before the council for consideration, and that the same is subject to such alteration as the council may deem just in adjusting the several assessments to the basis of actual benefits, and all persons concerned are bound to know that the *prima facie* assessments against their property are liable to be increased as well as decreased. That this court prior to 1889 supported the doctrine that the legislature had constitutional sanction to declare, as matter of law, that the special benefits to a particular district, by an improvement, were equally received by bordering property, and equal to the total cost, has little force as an argument. The answer to it is that the injustice and hardship resulting from the doctrine were potential in securing legislative action for the amelioration of the rule. We think it evident that the Assembly of 1889 determined upon a modification of the old rule, so far as it required an equal distribution of the cost of an improvement on all bordering property, without regard to the question of actual benefits. Not that the rule offended either the federal or State Constitution as then interpreted by the federal and State courts (for no question of that character had been raised in this State), but because it was required by the simplest principles of justice. The act of 1889 must be tested by the usual canons of construction, and if from these it appears that the Assembly took cognizance of the mischiefs resulting from the old law and provided a remedy in advance of constitutional requirement, the legislation is not to be discredited by the fact that the courts have come to restrict the constitutional limitations to the bounds set by the statute. The important inquiry is: Is the statute, as enacted in 1889, and as it now stands, antagonistic to any of the principles of the federal Constitution as now construed by the United States Supreme Court.

Section 3 (§4290 Burns 1894, §6773 Horner 1897) provides: "In all contracts specified in the preceding section the cost of any street or alley improvement shall be esti-

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mated [not assessed] according to the whole length of the street or alley, or the part thereof to be improved per running foot * * * and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved, * * * shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them, to the whole improved line for street and alley improvements, * * * and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectible as hereinafter provided * * *. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvement in this act mentioned shall be paid out of the general fund."

The gist of these provisions is that in providing for the payment for an improvement, the expense of it shall be estimated, that is calculated, by the running foot; the city or town shall be liable to the contractor for the full contract price, and, to reimburse it, the owners of lots shall be liable to the city or town for their legal proportion of the cost, in the ratio of their several frontage to the whole frontage of the improvement; which liability shall constitute a lien upon abutting property in favor of the city or town from the time such improvement is ordered.

Three things may be noted in these provisions: (1) That the cost shall be *estimated* by the running foot, not so assessed; (2) that the liability shall relate to the frontage; and (3) that the liability and lien shall arise and attach at the time the improvement is ordered. There is nowhere to be found a mandate that the costs shall be *assessed* by the frontage rule or that property shall ultimately be required to contribute equally per front foot. The measure of liability

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and lien here mentioned is only conjectural at most, since they arise before an ascertainment of the facts, by measurement, necessary to their definite determination. The provision can only mean that the liability and lien, when definitely ascertained by the report of the engineer, as required by section six, as reviewed and adjudged by the common council, as required by section seven shall relate back to the time of ordering the improvement.

If we read section three as providing a fixed rule of assessments as contended, the effect is to render section seven meaningless and nugatory; for it clearly follows that if the rule of assessments is unalterably fixed by section three, the hearing provided for in section seven is nothing more than a cunningly devised illusion which expressly provides that the aggrieved property owners shall have the right to present their grievance to a tribunal that has no power to grant relief. This is mockery pure and simple, and implies insincerity and dissimulation in the lawmakers, which we can not indulge.

On the other hand, if we read section three as providing a basis for assessments which shall be *prima facie* correct, and which shall be held to be the true and correct assessments until assailed by the property owner, and shown upon a hearing, by a preponderance of proof, to be incorrect, or found to be unjust and altered and amended by the common council of its own motion, then we find sections three, six and seven in complete harmony, each effective, and in accord with the other provisions of the act. The intention is to be ascertained by considering the entire statute; and we must proceed as we would with any other composition, construing it with reference to the leading idea and purpose of the whole instrument. The general intent is the polar star by which the meaning of any part is to be determined with a view to harmonizing the entire act. Sutherland's Stat. Con. §239.

We therefore conclude that section three, acts 1889 (§4290 Burns 1894) must be construed as providing a rule

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of *prima facie* assessments in street and alley improvements, which allotments by the city or town engineer, under section six of said act of 1889 (§4293 Burns 1894), are subject to review and alteration by the common council and board of trustees, under section seven of said act of 1889, as amended (Acts of 1891, p. 324, Acts 1899, p. 64, §4294 Burns 1894), upon the basis of actual special benefits received by the improvement; and that under said section seven, the common council of a city, or board of trustees of an incorporated town, have not only the power, but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners.

The further question is propounded: If, in adjusting assessments to actual special benefits received, it shall be found that the total cost of the improvement exceeds the total sum of special benefits accruing therefrom, what provision is made for the excess of cost? It is quite clear that the common council or board of trustees have no power to impair the obligation of contracts, and that some provision must be made for full payment of the contract price for the improvement.

Section five of said act (§4292 Burns 1894) reads as follows: " * * * The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kind of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed and collected as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town, to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town."

Here is a new power granted the common council and

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board of trustees to order, by a two-thirds vote, any improvement, as fully as they could do upon a petition, as provided by section one; and when the body chooses to exercise this power, it may elect among three schemes, in providing payment for street and alley improvements. It may either charge the whole expense against the general revenues of the city or town, or it may charge a part against the general revenues and a part against the abutting property, or it may charge all the expenses of such improvement against the abutting property, upon the presumption, which it may for the time indulge, that the aggregate special benefits accruing therefrom will be equal to the total expenses; but it must take notice, when it decides to charge the abutting property, that the expenses shall be assessed "as hereinafter provided" in sections six and seven, which, as we have seen, must be done upon the basis of actual special benefits received.

Section three (§4290 Burns 1894) provides that "the city or incorporated town shall be liable to the contractor for the contract price of said improvement," and when a city or town enters into a contract, under the scheme of requiring the abutters to contribute to the cost to the extent of their special benefits, the corporation is bound to know that if it shall be found, upon the hearing provided in section seven, that the accruing special benefits are inadequate to pay the expenses of the improvement, the deficit must be provided for from the general revenues of the city or town. The question of deficit can not be determined until the common council has concluded its hearings and made the assessments. At this stage, the improvement has been completed and the contractor entitled to his pay. It is then too late to halt or retreat. No course is then open to the corporation but to go forward and put into exercise the power conferred by section three and order the deficit paid from the general treasury.

The contingency of a deficit arises from the law, and enters into and becomes a part of the order for the improve-

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ment and a part of the contract therefor, and is but a reasonable exercise of the continuing power to pay any part of the expenses from the general revenues when the fact arises that they can not be fully met by the special benefits. The entering into a contract under the scheme of requiring contribution from special benefits to the extent thereof, is an election between methods of payment, and, when once chosen and entered upon, the procedure thereunder, as fixed by the law, is as imperatively commanded as if no other existed. The insistence, therefore, that the law contains no mandate that the common council or board of trustees shall, in any event, pay any part of the expenses of such improvements, from the general revenues, can not be sustained.

We are aware that this court has held that when the assessment scheme is pursued in making such improvements, the city or town assumes no primary liability, except for street and alley crossings; and what we here hold is that, as to a deficit only, if any, in special benefits, to meet the costs of an improvement, the city or town sustains the same primary obligation imposed upon it for street and alley crossings.

There is language used in *City of Terre Haute v. Mack*, 139 Ind. 99, and perhaps in other cases in this and the Appellate Court, not necessary to the decision of any question presented by the record, that appears in conflict with what is here decided, but, in so far as such language may so appear, it is disapproved. The canons of construction compel the interpretation which we have given this act, and so construed it is not obnoxious to any provision of the State or federal Constitution, either under the Norwood-Baker case or the earlier decisions of the Supreme Court of the United States or of this State.

It is proposed by the improvement which affects the appellant to reduce the roadway of the street from seventy to fifty-six feet in width by an extension outward of the sidewalks from fifteen to twenty-two feet. The sidewalks have

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heretofore, under corporation direction, been improved to a width of fifteen feet from the lot lines, the first ten feet paved with brick, and the balance to the curb graded and sodded; and it will be noted from the facts stated on the first page of this opinion that a part of the proposed improvement consists of filling the space between the brick sidewalk and the new curb with "good rich dirt", to be smoothed to a grade with the brick sidewalk and new curb, and covered "with good, live, fresh sod."

The point is made that, conceding the constitutionality of the Barrett law, the ordinance is void for want of power in the common council, under the statute, to assess the cost of filling with rich dirt and sodding against the abutters. The first section of the act (§4288 Burns 1894) provides that the common council may "have the sidewalks graded and paved, or the whole width of the street graded and paved" under the provisions of the act. It may well be doubted if the authority here conferred can be extended to grading with a particular quality of earth, designed not for the permanency of the improvement but to produce a luxuriant vegetable growth. We think the words "grading and paving" are employed in the statute in the sense that the surface of the ground shall be made to conform to a regular line by cutting and filling with any sort of dirt suitable to the maintenance of the grade, and which may be most cheaply obtained, and smoothly covering the same with some hard substance, with the single view to permanency and easy travel for footmen and vehicles.

It is probably true, though we do not so decide, that the common council, in their general dominion over the streets, have implied power to construct lawns, and otherwise decorate those parts of the street not necessary to public travel, at the expense of the general treasury, but when it seeks to exercise the taxing power, and to levy upon a particular class the cost of an improvement, purely ornamental, it must be able to point to some express provision of the statute con-

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ferring the right; no power to tax will arise by implication. *Doe v. Chunn*, 1 Blackf. 337, 338; *City of Lafayette v. Cox*, 5 Ind. 38; *Slessman v. Crozier*, 80 Ind. 487; *Gallup v. Schmidt*, ante, 196.

The council has express authority of law to require the planting of shade trees at the expense of the abutters (§3541 Burns 1894, §3106 Horner 1897, cl. 46) but it can not be said that this right carries with it the power to construct lawns or other decorations in the streets, and to enforce the cost thereof against the abutters. The power is at least doubtful, "and any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power denied". *Dillon's Mun. Corp.* (4th ed.), §89, approved: *City of Crawfordsville v. Braden*, 130 Ind. 149, 152, 14 L. R. A. 268; *Williams v. Davidson*, 43 Tex. 1, 33; *City of Corvallis v. Carlile*, 10 Ore. 139; *Kirkham v. Russell*, 76 Va. 956.

We therefore hold that the ordinance, so far as it provided for the grading with rich dirt and sodding, as a part of the proposed improvement, was void as being *ultra vires*, and that the appellant was entitled to an injunction against so much of said proposed improvement. Equity will enjoin the exercise of an unauthorized power. *Sackett v. City of New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *Board, etc., v. Gillies*, 138 Ind. 667, 673; *Dillon Mun. Corp.* (4th ed.), §914.

If entitled to any part of the relief sought, the demurrer to the complaint should have been overruled.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Baker, J., dissents from so much of the opinion as affirms the constitutionality of the Barrett law.

DISSENTING OPINION.

BAKER, J.—I regret my inability to agree with my brethren in their construction of the Barrett law. In stating my

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reasons, with all due deference, I think it proper first to determine accurately the question presented for solution. The federal Constitution is not what the citizen may read it to be, but is what the Supreme Court of the United States declares it to be. I concur in the statement that, prior to the *Norwood v. Baker* decision, 172 U. S. 269, 19 Sup. Ct. 187, 42 L. ed. 443, the method stated in §752 of Dillon was constitutional, that is, that the legislature in its discretion might declare *as a matter of law* that the whole cost of a street improvement and the special benefits to abutting property equaled each other, and that the cost should be apportioned according to frontage, and that the property owners were entitled to a hearing before a tribunal authorized to review the assessment and see that it justly conformed to the frontage basis. For brevity, I shall call this the "old" constitution. I concur in the statement that, since the *Norwood-Baker* decision, the method stated in §752 of Dillon is unconstitutional, and that nothing short of the method stated in §761 of Dillon is constitutional, that is, that the legislature must provide a method by which the special benefits to contributing property shall be determined *as a question of fact*, and that the excess of cost above the sum of special benefits is a general benefit to be paid for from the general treasury, and that property owners are entitled to a hearing before a tribunal authorized to review the assessment and see that it justly conforms to the basis of benefits in fact received. For brevity, I shall call this the "new" constitution. The text-books and reports are full of the general statement that "the only basis for special assessments is special benefits". Concerning this proposition there has never been any disagreement, so far as I have been able to learn. But from this common starting point, two very dissimilar lines of thought have been followed. In one, it was said: "Special benefits are the only legitimate basis for special assessments, but the legislature may declare as a matter of law that the property owner's special benefits are

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exactly equal to his special assessment by frontage". In the other, it was said: "Special benefits are the only legitimate basis for special assessments, but the property owner may not be specially assessed beyond his special benefits found as a matter of fact." So, finding in reported cases the expression that special benefits are the only legitimate basis for special assessments does not of itself show which theory a court has adopted. It is hardly conceivable that a court would be following out the two theories at the same time. They seem as far apart as the poles, as essentially different as a question of law is from a question of fact. A legislative act, it seems to me, must have some consistent theory underlying it. It can not well be two different things at once. The legislature must have intended the one or the other,—not both. And, though it is within the range of possibilities that the legislature in 1889 might have framed a law which would meet the requirements of the "new" constitution of 1898 and which would be permissible under the "old", the question is: Which theory was it that the legislature intended to conform to in the Barrett law? Is it likely that, by prescience or by chance, the legislature hit upon the requirements of the "new" constitution that were not in the "old"? Or, on the contrary, did the legislature intend to carry out the same policy, sanctioned by the judiciary, that had been in operation for nearly forty years,—with the addition of the bond feature?

Before proceeding with the question, it may be well to notice two lines of argument advanced by counsel for appellee, to which my brethren, perhaps unconsciously, may have accorded some weight. One is, that this court must presume that the legislature intended its act to conform to the Constitution, and therefore this court by intendment should supply to the act whatever is needed to make it constitutional. The other is, that the Supreme Court of the United States will follow any line of decision that this court may adopt. Whether or not this last statement is true is not within the

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province of this court to decide; and whether, if that were true, it is an argument addressed to the reason, or an appeal to what counsel may believe to be the prepossessions of this court, is not worth while to consider. But counsels' first contention is of great importance. If the contention were correct, then this court and every court has committed a grievous wrong against an independent and coördinate branch of the government every time a statute has been held to be unconstitutional. But, it seems to me, such a process is not judicial construction. Judicial construction is not an unbridled force, operating this way in one case and that way in another, according to caprice or what courts may think would be good legislative judgment. The function of judicial construction is, not to hold statutes constitutional, but to determine the meaning of statutes. If it is found that the legislature has acted within the scope of its powers, courts should let the act alone whether they deem it wise or not. If it is found that the legislature has usurped power and invaded the reserved rights of the people, it should be the duty of the courts rigorously and jealously to uphold the rights of the people, even if they think the legislature ought to have the power it attempted to exercise. The first business of the courts is to ascertain judicially the meaning of the statute. Whether the statute is constitutional or unconstitutional can not be determined until the meaning of the statute is first determined. And that meaning should be determined according to rules of law that the courts should uniformly follow. If courts recognize no rules in declaring the legislative intent, or disregard the lawful order of applying recognized rules, the people, the bar and the inferior tribunals would have no means by which to make even a fair guess at what would finally be declared to be the law. If there is no law to control courts' interpretation of law, as well might there be no law at all. *Non licet iudicibus de legibus judicare, sed secundum ipsas.* But, if counsel were correct in the contention that the court

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should first examine the Constitution and then by construction mold the statute to fit it, the argument, it seems to me, should operate against appellee, and not in its favor, for the Constitution that the members of the legislature of 1889 had sworn to support was the "old" constitution. They may have had the prevision to see that a "new" one was coming, but they were not bound to frame their laws according to its fashion. Yet, the impression remains with me that my brethren have first laid out the new pattern and then cut the old material to fit it.

The Barrett law is too lengthy to set out here in full. But, omitting such portions as are exhibited in the majority opinion, I shall endeavor to give the framework of the statute. The first section provides for the beginning of street improvement proceedings by the petition of property owners. The second section authorizes the common council to declare by ordinance the necessity for street improvements, and directs notice of the passage of such an ordinance to be given by publication. "Said notices shall state the time and place when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof." This section does not purport to relate to the method of assessment, or to give property owners a hearing on any subject except the necessity of the proposed improvement; and, as the power to decide is left within the unqualified discretion of the council, the objections which property owners could make on the question of the necessity of the improvement would necessarily be advisory only. Accordingly, it is decided by this court that the common-council may enter an order for the construction of the improvement before giving notice of the resolution of necessity. *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, 462. This being so, I am unable to perceive how section two has any application to the construction of the sections that point out the procedure after the performance of the work has been determined upon. The third sec-

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tion, omitting the part in reference to sewers, declares that "the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, *per running foot*, * * * and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved, * * * shall be liable to the city for their proportion of the costs *in the ratio of the front line of their lots* owned by them to the whole improved line for street and alley improvements, * * * and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, *from the time such improvement is ordered*, for such costs of improvement, collectible as hereinafter provided, * * * and the owners of such unplatted lands bordering on such street or alley or the part thereof to be improved shall be liable to the contractor for their proportion of the cost *in the ratio of the front lines of such unplatted lands* owned by them to the whole improved line; and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands [the cost] shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of *one hundred and fifty feet* from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement. * * * Any mistake in the description of the property or in the name of the owner shall not vitiate the lien of such assessment. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvement in this act mentioned shall be paid out of the general fund." The fourth section provides for an allowance to the owner of any lot who, before the contract is let, has made any improvement in front of his lot in accord-

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ance with the general plan of improvement for his street; and provides for taking security from the contractor. The fifth section: "When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfilment, the common council * * * shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to cause the same to be paid out of the treasury, deducting a reasonable amount of percentage to secure the completion of the contract until the whole shall be finished, and to prescribe the time in which the whole shall be completed, and such estimates shall be a lien upon the several parcels of ground upon which they are assessed to the same extent that taxes are a lien, and shall have the same preferences over other demands, and such liens shall be in favor of the city or incorporated town, and the owner of the certificates or bonds hereinafter mentioned to secure the city or incorporated town and such owners the reimbursement for such cost of improvement hereinafter provided for. The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town." The sixth and seventh sections are set out in the majority opinion. The eighth section authorizes the issuance of improvement bonds, in anticipation of the collection of the assessments, for the payment of which bonds the lot owners provide the money in annual instalments, and commands that, after the assessment has been confirmed by the

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common council, "no suit shall lie to restrain or enjoin the collection of such assessment, and the validity of such assessment shall not be questioned, and such bonds, when issued, shall transfer to the owner thereof all the right and interest of such city or incorporated town in and to such assessments and the liens thereby created, with full power to enforce the collection thereof by foreclosure or otherwise, under any of the provisions of this act." The ninth section provides for the foreclosure of assessment liens, and transfers the city's interest in the liens to the holders of the bonds. The tenth section authorizes the collection of assessments by the city treasurer by sale upon precept, and allows the lot owners the right of appeal to the circuit court of the county, but "in case the court and jury shall find, upon trial, the proceedings of said officers subsequent to said order directing the work to be done are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the said property to be sold and conveyed by the sheriff thereof as the said treasurer is hereinafter directed to sell and convey property liable to street improvements." In regard to section ten, it is evident that, under any construction of section seven, the appeal from the precept has become nugatory; for, the assessments having been made conclusive on the hearing before the council, the property owner may not again contest what has been finally adjudicated. But section ten is important in considering the changes made in street improvement proceedings by the Barrett law.

Now, the question being under which of the two inconsistent methods of laying assessments the legislature intended to act,—whether under the "old" constitution according to special benefits declared as a matter of law, or under the "new" according to special benefits to be determined by the assessing officers as a matter of fact,—the answer should require an examination of the whole statute, in the light of

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the circumstances surrounding the legislators in 1889, in order to determine the entire scope and manifest intent of the act. And the first of these circumstances is the attitude of this court.

For nearly forty years prior to 1889, street improvements were made in this State under laws that declared that the special benefits and the assessments by frontage for the entire cost, except for street and alley crossings, equaled each other; and this court uniformly held that such laws were in harmony with the "old" constitution. In *Snyder v. Town of Rockport*, 6 Ind. 237, May term 1855, an act was assumed and declared to be constitutional that directed the town board, on petition of two-thirds of the owners of abutting property, to assess the whole cost upon all abutting property and to apportion the cost according to the last assessed valuation of such property. In *Goodrich v. Turnpike Co.*, 26 Ind. 119, May term 1866, the constitutionality of a local assessment act, wherein the legislature had fixed the "special benefits" arbitrarily as a matter of law, was under consideration, and this court, among other things, said: "It is claimed that the assessment authorized by this statute is not a tax, not a burden or charge imposed by the legislative power of the State upon persons or property to raise money for public purposes, but the exercise of the power of eminent domain, in taking private property for public use, 'without just compensation'. There is a manifest distinction between the taxing power and that of eminent domain. Both, in effect, appropriate private property to public uses. They differ only in degree. Taxation exacts money from individuals as their share of the public burdens, and the tax payer, according to the theory of our system, receives a *just compensation* in the benefits conferred by the government in the proper application of the tax. When, however, property is appropriated by virtue of the right of eminent domain, it is taken, not as the owner's share of a public burden, but as so much more than his share. Many of our

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public improvements are local in their character, and confer special benefits on those in their immediate vicinity. By a long line of decisions of this court, these benefits may be set off against damages sustained by the appropriation of private property for public use, in the construction of such works. In the case in judgment the legislature has determined, and this matter is within its power, that this is a proper subject for taxation, and that the burden imposed is the just share of each person embraced in the provisions of the act." In *Palmer v. Stumph*, 29 Ind. 329, May term 1868, it was said: "By this act the rate is the same upon every one within reach of the assessment, *that is the exact benefit each may receive from the improvement of the street. The legislature have adopted this method of reaching that result.* It is certainly reasonable to suppose that, as a rule, property along the line of a street improved will be equally benefited; that, as a rule, the *property fronting upon a street, foot by foot, will be of equal value and should therefore be equally assessed.*" In *Ray v. City of Jeffersonville*, 90 Ind. 567, May term 1883, an assessment under the street improvement law of 1881 was attacked on the ground that the act was in violation of section 21 of article 1 of our Constitution, which provides that "no man's property shall be taken by law without just compensation"; and the court held the act valid as against that objection. This court, through Mitchell, C. J., in *Ross v. Stackhouse*, 114 Ind. 200, November term 1887, declared: "Special assessments for street and other similar improvements are upheld upon the theory that each lot or tract of land assessed is benefited in a special and peculiar manner in a sum equal to the amount estimated or assessed against it." Through the same judge the court in *Garvin v. Daussman*, 114 Ind. 429, May 8, 1888, in speaking of the kind of notice and hearing that was thought to satisfy all constitutional requirements, said: "In the imposition of poll or occupation taxes, where a certain sum is assessed against each individual exer-

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cising a given avocation, or according to his age, *without regard to actual benefits*, the necessity of notice and a hearing is reduced to a minimum. To a measurable extent, the same principle is involved when the cost of an improvement is, as by law in proper cases it may be, apportioned by mere mathematical calculation, according to a certain rate per front foot. * * * The principle which underlies and upholds special assessments, such as that involved in the present case, is, that the lands assessed are enhanced in value to an amount equal to the cost of the improvement, which is to be apportioned among those specially benefited in the manner prescribed by law. * * * It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way. * * * If, therefore, the law provides for *giving notice* and for a *method* whereby the property owner may ultimately challenge the *correctness* of the assessment made against his property, in respect to whether it was made in good faith, *without intervening mistake or error*, and according to the *method* and under the *safeguards provided by the law*—the constitutional provision is deemed to be satisfied."

Taking the foregoing as a fair illustration of the judicial history of the question down to 1889, I can not agree in the statement that the constitutionality of the front-foot method had been considered only in reference to the provision requiring uniformity and equality in taxation and never in reference to "just compensation" and "due process of law"; and I am unable to reconcile such a contention with the admission that Dillon and Cooley were not without warrant in classing Indiana "as one of the majority states upholding the doctrine that it is competent for the legislature conclusively to declare that the total cost of a local improvement shall be assessed equally against the frontage".

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The legislature of 1889 not only knew this judicial history but also were aware that it was occasioned by a uniform and consistent course of legislation since 1852. Prior to 1889 the street improvement laws had been changed many times, and yet it is agreed that the underlying plan remained the same. In 1889 certain changes were made; and my brethren, if I understand them, state that the legislature intended to abandon the whole theory of local assessments under the "old" constitution and to adopt the theory of the "new". And this, on account of the people's dissatisfaction with the law. But it is said that "It is evident that the discontent did not arise from the method of frontage assessments as a rule, for that principle had been consistently maintained in every enactment since 1852 and was carried into the Barrett law".

The last declaration of this court on the subject of street improvements, prior to the meeting of the legislature in January, 1889, was made in *Garvin v. Daussman*, 114 Ind. 429, in May, 1888. In that case, as in some earlier ones, the constitutionality of the arbitrary front-foot method was upheld not only in respect to "uniform and equal taxation", but also in respect to "just compensation" and "due process of law"; and the court then advised the legislature that "the determination of the common council * * * may be made conclusive. * * * It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way". In making up the Barrett law, the legislature did not strike out into new fields; but they took, as the foundation to work upon, the old street improvement statutes of this State, which are confessedly based upon the arbitrary front-foot method; and adopted from other states certain elements that stood as component parts of the arbitrary front-foot method. Compare Bates Ann. Ohio St. 1899, §§2293a,

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1-9, and 2293b, c, and d; also New York laws 1870, ch. 619, 1881 ch. 689, 1884 ch. 510, 1885 chs. 396 and 406, 1893 ch. 550, 1895 ch. 816; and *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682; *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280; *Lyon v. Town of Tonawanda*, 98 Fed. 361. The new features that were not in our former statutes are the provisions for the resolution of necessity, for the issuance of bonds and the foreclosure of the liens represented thereby, for the laying of the assessments by the city engineer, and for the substitution of the common council for the circuit court as the tribunal whose judgment, after a "hearing", makes the assessments conclusive. As these features are well adapted to fit into the scheme of laying street assessments by the arbitrary front-foot method, and as such was their place in the legislative plans of Ohio and New York and perhaps other states, it strikes me as a somewhat violent assumption to say that the legislature of 1889 must have intended, by the introduction of these provisions, to grant the property owners rights *beyond* those given by the "old" constitution that was then in force and to afford them the protection guaranteed by the "new" constitution of 1898. The proper assumption would be that the legislature did not intend to depart from a long settled policy or to have the basis of assessment, which was brought forward from our former statutes, viewed in any other light than that of its settled construction. The new provisions, except section six, do not purport to fix any rule for laying the assessments. Section six expressly makes frontage the basis for street assessments. So, it is found that in the only new section which speaks of the method of assessment the same plan is apparent that inheres in the old matter which was reenacted. And in no other way could section six have been harmonized with the former laws which were used as the foundation of the new. Yet on the word "hearing" in section seven is hung a construction which, as it seems to me, conflicts not only with the former laws but also

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with the concurrently new matter in section six. My brethren seem to have overlooked the consideration that, in enacting the Barrett law, the legislature may have found that the then existing statutes, which permitted the property owners separately and one at a time to contest in the circuit court the correctness of their assessments, did not afford a satisfactory basis for the issuance of bonds, and that the substitution therefor of a "hearing" before the common council, at which all objections could be disposed of together, furnished "a comparatively summary way" of rendering the assessments conclusive, as suggested in *Garvin v. Daussman*, 114 Ind. 429.

It seems to me that my brethren have acted upon the plan of first adopting a construction of section seven and then construing the rest of the act (so far as it is set forth by them) in a way to conform thereto. I think this is not a proper method of interpretation; and I can not, under the rules of construction as I understand them, find the meaning in section seven that has been given to it.

The language of the section furnishes no foundation for the construction adopted. It makes no allusion to special benefits. It fails to command the city to refrain from assessing upon the abutting lot an amount in excess of the special benefits actually received by it, and to refrain from assessing upon the property in the taxing district an amount in excess of the sum total of the special benefits actually received by the several parcels of contributing property. It fails to command the city to pay from the general treasury the excess of cost above the total special benefits,—the part that benefits only the municipality at large. Benefits and damages are the varying degrees above and below zero on the compensation-scale. If a lot owner's special benefits were below zero, from what source and by what method is he to be made even? The section fails to provide. These omitted matters might have been fully and explicitly supplied by the legislature by tacking them onto the word "hearing",

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but it did not do so. My brethren say that "From the term 'hearing' is necessarily implied the power to administer some adequate remedy". That remedy, they say, must be a determination of special benefits actually received, for otherwise the legislators are accused of insincerity, dissimulation and mockery. The argument seems to me a plain begging of the question. The question is: Did the legislature intend to provide the "hearing" required by the "old" constitution then in force, or the "hearing" required by the "new" constitution of 1898? The argument seems to assume that in 1889 no "hearing" was a "hearing" unless it was for the purpose of determining benefits actually received as a matter of fact. Although I agree in the statement that well-disposed taxing officers would remedy their omissions and mistakes, if they noticed or were informed of them, without any "hearing", yet I say that the legislature never had the power to frame a law that shut off the property owner on the presumption that the assessing officers would make no omissions nor mistakes. In all valid taxation, three things have ever been required. First, a law directing the assessing officers how to proceed. The authority to tax is exclusively a legislative power. "This is manifest from the slightest consideration of what taxation is. It is *the making of rules and regulations* under which the necessary revenues for all needs of government are to be apportioned among the people and collected from them." Cooley on Taxation (2nd ed.), 41. Second, an assessment by the proper administrative officials, which must be made in substantial conformity to the method prescribed by the law,—for the expression of one method is the exclusion of all others. Third, an opportunity for the property owner to have a "hearing" before some tribunal, with judicial powers, on the question whether or not the assessing officers have substantially complied with the method prescribed by the law. So, the word "hearing" does not necessarily imply a hearing on special benefits as a matter of fact; for, on the ques-

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tion of the correctness of special assessments for special benefits declared as a matter of law, the property owner was entitled to a "hearing", and it would have been oppression and confiscation to have denied it to him.

The city is the actor in prosecuting the proceedings that result in a judgment making the assessments conclusive upon the lands of abutting proprietors. The engineer files his report assessing each piece of contributing property a certain sum as he has computed it according to the commands of section six. The hearing provided for in section seven is, according to the language of the act, a *hearing upon the report of the engineer and the assessments therein*. It is axiomatic that in all hearings, the tribunal must determine the case *upon the charge filed against the defendant*. This is true, not only in all cases before regularly ordained courts, but also in all special proceedings before special tribunals. In proceedings before city commissioners for the opening and vacation of streets (§3166 *et seq.* R. S. 1881 and Horner 1897, §3629 *et seq.* Burns 1894), before circuit courts and before boards of county commissioners for the establishment of public drains (Ch. 49 R. S. 1881 and Horner 1897, Ch. 53 Burns 1894), before boards of county commissioners in the various proceedings relating to free gravel roads (Ch. 70 R. S. 1881 and Horner 1897, Ch. 76 Burns 1894), the landowners are afforded a hearing on the question of special benefits, not because they are offered a *hearing*, but because *the charge*, upon which the hearing is had, is *that their particular lands are severally specially benefited*. In all these cases, the *question* for the tribunal to determine on the hearing is *whether the engineer* (or viewers or corresponding officials who formulate the *charge* against the property owners) *has fully, impartially and correctly performed the duties laid upon him by the statute*. If he has, judgment confirming his action is rendered; if he has not the tribunal alters or amends, or requires him to alter or amend, his charge to conform to what it should have been in the first

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place if he had complied with his duties under the statute, and then renders judgment on the charge. This principle has been fully recognized in the street improvement cases of *Garvin v. Daussman*, 114 Ind. 429, and *City of Terre Haute v. Mack*, 139 Ind. 99. In *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 852, 45 L. R. A. 289, June 19, 1899, the supreme court of Texas had before it a law that is exactly the same in essentials as the Barrett law. After the engineer files his report of the total cost, etc., and of the assessment upon each lot by frontage, the city council gives notice by publication of a *hearing* when the property owners may "object to any such acts and proceedings and show wherein they have been or may be wronged or injured thereby, and ask for a revision or correction of the same". The city council can not make the final assessments until all objections have been heard and determined. It will be observed that the Texan property owners were given an opportunity to "show wherein they have been or may be wronged or injured" by the front-foot assessment. This is certainly as broad as the right to "make objection" to the report and the assessments therein. And the court said: "The foregoing provision of the charter authorizes the property owner to call upon the city council to revise or correct errors committed in the proceedings had in assessing the cost of improvement against his property, *but it does not empower the council to do anything that it or its officers could not have done in the first instance.* The words 'revision' and 'correction' mean that the council may be called upon to review that which had been done, and *to make the proceedings conform to the law.* *Vinsant v. Knox*, 27 Ark. 272. The city council and the officers acting under the authority of the charter of the city of Houston having no power in the first instance to consider the question of benefits in fixing the amount to be charged against Mrs. Hutcheson's property, a revision and correction of the acts done could not give relief against the wrong complained of.

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* * * The claim that, upon petition of Mrs. Hutcheson, the council could have afforded relief from the unlawful exaction, is wholly unsupported by the terms of the law, and is in direct conflict with many of its provisions. *The wrong did not consist in a failure to follow the directions of the law, but in obeying its unconstitutional requirements*". So, on the *hearing* mentioned in section seven of the Barrett law, the inquiry must be confined to the question whether or not the assessment reported by the engineer has been made as it ought to have been made in the first instance, that is, in conformity to the terms of the law prescribing his duties,—unless that hearing, of all the hearings in the world, is to be made an exception to the universal rule that a tribunal must determine a case on the charge filed against the defendant and is not at liberty to discard that charge and reach out and draw in some other from undefined sources and by undefined methods.

On the "hearing", the common council "may adopt, alter or amend such report and the assessments therein". It is true that "alter" means "to make otherwise". But it does not follow that the report and the assessments therein can not be made otherwise than the engineer made them except by abandoning the method of testing the assessments by the standard of special benefits declared as a matter of law and following the method of testing the assessments by the standard of special benefits actually received determined as a matter of fact. If the engineer made any mistakes in following out the front-foot method prescribed for him, his report and the assessments therein would be made otherwise by correcting the errors. But "alter" is used in connection with other words. The council "may amend" the report and the assessments therein. "Amendment" is usually understood in law to mean the supplying of deficiencies. If the engineer made any omissions of property or other material matter, his report and the assessments therein would be amended by supplying the deficiencies. The council

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"may adopt" the report and the assessments therein. If the engineer, as the assessing officer, has made no mistakes nor omissions in laying the assessments in his report, surely the council, as a reviewing tribunal, should be permitted to confirm the assessments. In taking the actual language of the clause, something more than the word "alter" should be considered. For example, it makes a difference whether the auxiliary verb "may" or "shall" is connected with "alter". Standing alone, "alter" can be given the broadest definition to be found in the dictionaries; and if the auxiliary verb and the object are to be assumed and not taken from the actual language of the clause itself, it is possible, of course, to say that the common council "*shall* alter the *basis* of the assessments in the engineer's report". But the actual language is that the council may adopt, alter or amend the engineer's report and the assessments therein. The method on which the engineer's report and the assessments therein are based has been continuously asserted throughout the preceding sections. The canons of interpretation require that general words be limited to the sense of the context. "Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses." Sutherland Stat. Const. §262. "General words or clauses may be restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity, it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act." Sutherland §246.

To insert into the seventh section the elements that the legislature failed to include is, I think, not only violative of

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the plain language of that section, but is destructive of other parts of the act. The primary rule of construction is to take the language of the legislature in question according to the plain and ordinary meaning of the words, without adding to or taking therefrom, and, if the language so taken does not create an ambiguity, to accept it as declaratory of the legislative intent. But if there were an ambiguity, then the next rule of construction should require the court so to resolve the ambiguity as to give effect and purpose and meaning to the other parts of the act. If the ambiguity (supposed, for the sake of argument) were resolved in favor of the idea that the council on the hearing is required to determine the assessments on the basis of special benefits actually received, then the sixth section is deleted from the act and the legislature is convicted of the folly of having provided elaborately and explicitly for a method of assessing upon each front foot throughout the improvement an equal sum (a method that necessarily excludes the consideration of special benefits actually received) and then declaring that on the hearing the council, not *may*, but *shall* disregard and throw aside all that has been done relating to assessments and begin *de novo* and make the assessments by the method of determining the special benefits actually received. My brethren seek to save some purpose and meaning in section six by holding, as I understand them, that the engineer does not make the assessments but simply reports certain facts for the enlightenment of the council when that body enters upon the making of the assessments according to special benefits actually received. If this were true, section six would nevertheless accuse the legislature of dealing in futilities. How would the council, when that body purposes to enter upon the making of the assessments according to special benefits actually received, be enlightened by being informed of the total cost of the improvement? The average cost per front foot? The name of each property owner? The number of front feet owned by each? The amount due

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upon each lot, ascertained and fixed by multiplying the cost per front foot by the number of front feet of each lot? The legal description of each lot? How would these items afford the council any information on those matters on account of which my brethren say that special benefits actually received should be considered, namely, that it is "clear that all property bordering upon a municipal highway is not affected in the same way by an improvement of the latter; that in some cases the grade may be so raised or lowered as to impair most seriously the use and value of the property; in others, that some property may be situate upon a general level, highly improved and in a business part of the city, while others upon the same street may be remote from business, lying low and near a water course, and practically worthless for business or residential purposes; in others, some abutting lots may be twenty feet and others 200 feet deep"? But it is not true that the engineer simply reports certain facts and makes no assessments. He is required to ascertain and fix the amount due upon each lot by multiplying the average cost per front foot by the number of front feet of each lot. This is an assessment, as will hereinafter more fully be shown. It is sufficient for the present to point out that the legislature has in express words defined the engineer's ascertainment and fixing of the amounts due upon the several lots as "assessments". The legislature says that the matter in review before the council as a tribunal is the engineer's report and the *assessments therein*. And the matters, other than the assessments, in the engineer's report are material only on the theory that the property owners are afforded a "hearing" to challenge the correctness of the assessments, as "hearing" was defined in *Garvin v. Daussman*, 114 Ind. 429. It is true that, if a property owner's assessment were made on the basis of special benefits actually received, it could be figured out that the assessment amounted to so much per front foot; \$4.98 in one case and \$1.30 in another. But it would have been just

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as reasonable for the legislature to require the engineer to report the number of persons in each property owner's family; for, in the same way, it could be figured out that the assessment amounted to so much per head.

To insert into the seventh section the elements that the legislature failed to include would also destroy the fifth section of the act. That section empowers the council to pay the contractor from time to time during the progress of the work. Such payments are made out of the treasury and are declared to be liens upon the abutting property. The city incurs no personal liability to the contractor, but acts merely as an instrumentality in collecting money for the contractor from the property owners. *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681; *Spidell v. Johnson*, 128 Ind. 235. The plain meaning of the section is that if the city shall *advance* money from the treasury to the contractor, the city shall have the absolute right to *reimbursement* from the property owners by means of the liens that, by this fifth section, are put upon the abutting property. If the city, under section five, should advance to the contractor ninety per centum, say, of the cost, and if, under section seven as my brethren construe it, the city must limit the assessment against each parcel to an amount not exceeding the special benefits actually received by it, fifty per centum, say, of the cost, then the plain meaning of section five is utterly destroyed and the city would be left with a loss of forty per centum, say, of the cost, although the city had begun and carried forward the improvement under a resolution declaring that all of the cost, except for street and alley crossings, should be borne by the abutting property. If city officials had understood this necessary result of the construction contended for in this and other cases pending in this court, they might not have been so ready to deprive themselves of so much cash or debt-incurring margin to use for other purposes.

To insert into the seventh section the elements the legis-

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lature failed to include would also destroy the third section of the act. This section provides *the fund for paying the contractor*. As soon as the work is determined upon, the council makes a contract with the best bidder. The contractor gives a bond for the prompt and faithful performance of the work. The contract is of course binding upon him, and he must execute it or be liable on his bond. He enters into this binding contract on the faith of a positive legislative declaration: "The city or incorporated town shall be liable to the contractor for the contract price of said improvement, and *the owners of lots* or parts of lots bordering on such street or alley or the part thereof to be improved, * * * *shall be liable* to the city for their proportion of the costs *in the ratio of the front line of their lots* owned by them *to the whole improved line* for street and alley improvements, * * * and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement; * * * [which] shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and *the contractor shall have a lien thereon* for the value of such improvement." As already stated, the city is not personally liable to the contractor. If the city has advanced money, it has the lien by which to secure reimbursement. If the contractor receives his contract price in improvement certificates or bonds, he has the lien by which to collect the contract price of his labor and materials. This section also says that the city "shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings". The plain meaning of section three is that, unless the city voluntarily assumes in advance to pay some definite percentage of the total cost, the city shall pay for street and alley crossings and the property owners shall pay for the rest of the im-

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provement; and that, if the city assumes a certain percentage, the residue of the total cost, except for street and alley crossings which must be paid for by the city, is to be borne by the property owners. By the implied power that my brethren find in section seven, this meaning is destroyed. If the assessments are to be measured by the actual benefits which the property owners receive from the improvement, it is evident that the improvement as a whole must be considered. The question would be: How much special benefit does each lot actually receive from this improvement? And each owner's contribution towards the cost as a whole would be determined accordingly. And the excess of cost, as one sum, would have to be paid by the city. It seems indisputable that the total cost would thus be divided between the city and the property owners on a contingency that bears no relation to the number of feet in the street and alley crossings. Yet, section three clearly separates the improvement itself and the liability therefor into two distinct parts.

Further, in regard to section three, my brethren say that it should be noted that the provision is "That the cost shall be *estimated* by the running foot, not assessed". They quote the definition that an assessment is the "adjusting of the shares of a contribution towards a common beneficial object according to the benefit received". Here, again, my brethren seem to revert to the idea that the plan required by the "new" constitution is the only one in which special benefits are the sole basis for special assessments. But as already shown special benefits were the common starting point of the two divergent lines of thought. So, if the definition selected by my brethren were the one the legislators had in mind, it would not disclose which method they intended to pursue. But it seems clear to me, from an examination of the whole act, that the definition the legislators intended to express was that an assessment is "an *official estimate* of the sums which are to constitute the

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basis of an apportionment of a tax between the individual subjects of taxation within a district." Anderson's Law Dict. In section three, the part of the sentence that commands how the *estimate* shall be made and what the liability of the lot owners shall be, ends with a semicolon, and the sentence proceeds: "and in making the *assessment* against such owners for the improvement of such lots or parts of lots and unplatted lands [the cost] *shall be assessed* upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement". Again in section three: "Such *assessments* with the interest accruing thereon, shall be a lien upon the property *so assessed* and shall remain a lien until fully paid." And in section ten: "In case any of the owners of lots or parcels of grounds on which such *assessments* have been made shall fail or refuse for the space of twenty days after the date of the *estimate* to pay the amount *thereof* due by such person to such contractor, such contractor shall file his affidavit in the clerk's office of said city, stating that the whole or some part of said *assessment* remains unpaid," etc. And again in section ten: "And in case the court and jury shall find, upon trial, the proceedings of said officers subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the *estimate* has been properly made thereon, then said court shall direct the said property to be sold," etc. It therefore seems clear that the legislature understood an "official estimate" to be an "assessment". And the legislature did not confine itself to the use of the word "estimate"; for, in the part of section three that my brethren have omitted, it appears in plain words that the lots shall be "*so assessed*".

Again, it is said that section three contains no mandate

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that the property "shall ultimately be required to contribute equally per front foot". I do not see how language could be made clearer: "The owners of lots * * * shall be liable * * * in the ratio of the front line of their lots owned by them to the whole improved line". This liability is secured by a lien. It is the fund on which the contractor relies for payment. And it is the only fund, if the city is up to its debt limit, or becomes so after the contract is made and before the work is completed.

My brethren say that section three requires "that the liability shall relate to the frontage". But I take it that they do not mean to concede that the liability shall be according to the frontage. They only mean that the liability for special benefits in fact received, after it is determined at the conclusion of the work, is susceptible of being figured into a relation with the frontage,—a phase of the subject that has already been noticed sufficiently. But it is said that "the measure of liability and lien here mentioned is only conjectural at most, since they arise before an ascertainment of the facts, by measurement, necessary to their definite determination". The order for the improvement, which enters into the contract, and the contract itself, disclose the dimensions, location and character of the work, and the price per front foot in terms, or in terms reducible to the front foot. So far as the contractor is concerned, the moment the contract is let he can determine the amount of liability of each property owner and of the city for street and alley crossings as well as when the work is finished. It is true that in the assessment made by the engineer, at the conclusion of the work, the "total cost" may include other items, such as advertising, etc.; but in these matters the contractor is not interested, for the contract is the limit of his claim and lien. *City of Huntington v. Force*, 152 Ind. 368. But if there were any uncertainty in the amount finally to be allowed the contractor, no uncertainty would thereby be introduced into the liability, for the lien by the front foot

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could be fixed in advance for whatever amount the contractor's due proved to be.

In endeavoring to leave some purpose in section three, my brethren, if I comprehend their meaning, hold that the section does not fix any basis for assessments, but only provides for a *prima facie* calculation of liability. This seems to me a purpose that is contrary to the entire scope and manifest intent of the act. But I admit that it would be some purpose, if all the lot owners, except the "aggrieved" mentioned in section seven, might, by not objecting and not asking to be heard, accept the *prima facie* calculation as a correct statement of their liability. Such a construction, however, would at once run counter to the objection that the statute did not provide for a "uniform and equal" rate of assessment. Suppose that the *prima facie* calculation was \$1,000 against each A and B, who own equal frontage; that A is "aggrieved" and B is not; that A proves to the satisfaction of the council that his special benefits actually received are \$500; that A offers to prove that B's special benefits actually received are \$1,500; that the council agrees with A as to the truth of the matter, but holds that, since B has made no objections nor appeared to be heard, B has the right to accept the *prima facie* amount as the true amount;—then B receives \$500 in actual benefits that he does not pay for, and A is compelled to pay (1) his special benefits actually received, (2) his proportion of the city's contribution on account of general benefits, and (3) his proportion of the special benefits accruing to B and all others similarly situated. Now, to avoid this difficulty, it is further held that all persons whose lands are included in the engineer's report are bound to take notice that the council will so increase or decrease the *prima facie* calculations as to make them equal the special benefits actually received. And, in holding that the *prima facie* calculations are not even *prima facie* the true amounts but that the amounts must be adjusted on the radically different basis of actual benefits, my brethren come

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around to the original position of discarding all the steps provided for in the sections preceding the seventh and of requiring the council to determine the assessments *de novo* on the basis of actual benefits, thus depriving section three of any intelligent purpose.

It seems to me incredible that the *legislature intended* that its positive and explicit mandates, expressed in the prior sections, should be overborne by an implication read into section seven. And I think it equally faulty to suppose that the *legislature intended* that the contractor should bind himself, under penalty, to perform work, for the payment of which section three gives him a lien upon the abutting property by the front foot, and then that the common council, at the procurement of the property owners, should abrogate the contract, should destroy the improvement certificates or bonds, should approve and accept the work and deprive the contractor of his pay. To quote from *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289: "In support of this conclusion, we call attention to the potent fact that the city had entered into a contract with Storrie for the performance of the work at a stipulated price and with the agreement that he should be paid in improvement certificates, which would hold a lien upon the property, before the *amount* of the assessment was ascertained. If the engineer, for instance, *committed an error* in estimating the cost of the work in front of Mrs. Hutcheson's property, then a revision and correction of that act by the council could be had and the wrong could be corrected, because the contract itself furnishes the data, *and the correction would accord with the contract*. If, however, the council had changed the *basis of the assessment* against Mrs. Hutcheson's property from the costs of the work to that of benefits received by the property, whereby the amount assessed would be lessened, *the contract would have been annulled*. A construction should not be placed upon the language that would empower the city to destroy the contract without the consent of Storrie."

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If the pavement contractors had understood this necessary result of the construction contended for in this and other cases pending in this court, they might not have been so ready to take contracts under an act which deprives them of the absolute right to definite liens on the lots of the property owners and remits them to the uncertainty of collections from the municipalities. In *Cason v. City of Lebanon*, 153 Ind. 567, it was held that a contractor, in contracting to do street improvement work under the Barrett law, must take notice of the city's indebtedness; that, if the contractor could not collect from the city for its part of the liability, the whole contract was not destroyed; that the consideration to be paid by the abutting property owners was sufficient to support the contract; that the property owners had no ground of complaint unless the contractors put in higher bids than they would have if the city's part of the expense was collectible. This strikes me as justifiable doctrine, if the improvement itself and the liability therefor are considered as divided into two distinct parts which may be known to and examined by both the contractor and the property owners when the contract is let and before the work is begun. But under the construction of the Barrett law that is now adopted, the contract, *at the time it is made*, is severable neither as to the work nor as to the liability therefor. After the work as an entirety is done, a severance of the total liability is made; but, until then, no one could tell what was the extent of the city's liability or what the property owners'. If, at the time the contract is entered into, the city be indebted to the limit, it is likely that the contractor's bid would be higher on account of the uncertainty of getting his pay. Yet, no matter how high his bid, the chance of even getting his money back would depend upon a contingency, after his labor and materials were expended, entirely within the power and discretion of the adverse parties to the contract. And if, at the time the contract is entered into, the city have a debt-incurring margin to the amount of the con-

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tract, the council, without the consent of the contractor, could exhaust that margin in water works, electric lights, etc., and then find that the actual special benefits to the property owners were not half the amount of the contractor's expenditures. Street improvements are public improvements. Special benefits are benefits that are not common to the citizens in general. How much the contractor may collect as special benefits and how much as general benefits, is left for his adversary in the contract to say.

By my brethren's reading of section seven, that is, that the council on the hearing upon the engineer's report and the assessments therein shall disregard the method of assessment pursued down to that point and upon which the contract is based and shall substitute a *de novo* inquiry into the special benefits actually received, the legislature is accused and found guilty of ignorance of the meaning or even the existence of the word "benefits". Yet on the statute book, as already pointed out, there were many instances in which assessments for improvements were carefully provided for on the basis or by the method of ascertaining the special benefits as a matter of fact and limiting the assessments to that amount and apportioning the cost in ratio to such benefits; *and in this very statute, the Barrett law, assessments for the construction of sewers are directed to be limited and apportioned according to benefits.* Hereinabove only the material parts of the act relating to street improvements have been referred to. In reference to the assessment lien given in section three, the language concerning sewer construction is that "the cost of any such sewer *shall be apportioned among the lands, lots, and parts of lots, benefited thereby, and according to such benefits, * * * and the owners * * ** of the lots or parts of lots benefited by the construction of such sewer *shall be liable, * * ** for the construction of such sewer, *for the benefit of such lots or parts of lots thereby.*" In reference to the duties of the engineer in making his report to the council, the first six

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items from the sixth section relate to street improvements. The seventh item in that section relates to sewer construction: "*Seventh. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name, and the fair proportion of the cost of such sewer, according to the benefits conferred thereby, that should be assessed against such lot or part of a lot.*" If a sewer is constructed and a landowner objects to his assessment, the hearing on the engineer's report, provided for in section seven, gives him his "day in court" on the question of benefits *because the charge on which the hearing is had is that his lands should be assessed a certain sum according to the benefits conferred.* Sutherland says that attention should be given not only to the language used but also to "the words or expressions which obviously are by design omitted". §239. See also §241. It seems strange to suppose that the legislature did not know the vital difference between the engineer's assessment in street improvement cases and in sewer cases, between the lien declared in section three for street improvements and the lien declared in the same section for sewer construction, between a method of legislatively assuming and fixing the special benefits at the cost per front foot as a matter of statute law and a method of providing for a determination of the actual benefits as a matter of fact. And the legislature's nice particularity in making these distinctions can not be overborne excepting by reading into section seven an implication that renders meaningless many parts of the act and ignores others. All of the matter in the Barrett law in reference to sewer construction was a new feature in street improvement statutes in this State. I believe my brethren state the rule of construction correctly: "The intention is to be ascertained by considering the entire statute; and we must proceed as we would with any other composition, construing it with reference to the leading idea and purpose of the whole instrument. The general intent

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is the polar star by which the meaning of any part is to be determined with a view to harmonizing the entire act." But I do not understand the purpose in stating the rule, if it is not to be followed. I find that material parts of sections three, five, six, eight, nine and ten, and the whole of the interlaced sewer law are omitted from consideration.

It is axiomatic that the constitutional provision authorizing the levy and collection of taxes is not self-executing. It is fundamental that the provision can not be made operative by the executive department, nor by the judicial department, but only by the legislative department. It is elementary that the power must be carried into execution by appropriate legislation and that no taxing bodies or officers can make a valid assessment unless they follow with substantial strictness the precise method prescribed by the statute. If the constitutional provision be read into the statute, it is not perceived how the situation is changed. If the provision is not self-executing as it stands in the Constitution, it is not self-executing when read into the statute. If it can not rightfully be put into operation by the judicial department as it stands in the Constitution, it can not rightfully be put into operation by the judicial department when read into the statute. If it can only be carried into execution by appropriate legislation as it stands in the Constitution, it can only be carried into execution by appropriate legislation when read into the statute. The appropriate legislation necessary to put into execution the constitutional provision for taxation, by the method of limiting assessments to actual benefits in street improvements cases, can not be supplied by the judicial department, it seems to me, without going outside its proper limits.

The constitutional provision that "no man's property shall be taken by law without just compensation" is likewise not self-executing. It is a negative provision,—an inhibition. If the constitutional provision be read into the statute, what is accomplished? If it is only a negative provision,

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an inhibition, as it stands in the Constitution, it is only a negative provision, an inhibition, when read into the statute. If affirmative legislation is needed to enable a city to act under the provision as it stands in the Constitution, affirmative legislation is needed to enable a city to act under the provision when read into the statute. In the place of the established principles for ascertaining judicially the legislative intent, substitute the following formula: Take a statute in which the only method prescribed for fixing assessments is by frontage regardless of actual benefits; read into this statute the constitutional inhibition of the laying of assessments by that method; delete from the statute all that conflicts with the inhibition; and amend the statute by adding thereto all the affirmative legislation that is needed to prescribe a method of apportioning and limiting assessments according to special benefits actually received. In other words: Take a piece of paper and erase what is on it so that it becomes a blank; then write upon it the necessary directions by which a constitutional provision that is not self-executing can be executed.

"The certainty and stability of the law are among its chief excellencies. By following this legal injunction the common law has become a symmetrical system; the same authoritative rule applied to statutory construction gives a wholesome precision to dubious generalities, and otherwise removes doubts which arise upon obscure provisions, and has a salutary tendency to give confidence to those who must act upon statutes, but cannot settle their meaning". Sutherland §313. "The aid of contemporaneous construction is invoked where the language of a statute is of doubtful import and cannot be made plain by the help of any other part of the same statute, nor by the assistance of any act *in pari materia* which may be read with it, nor of the course of the common law to the time of its enactment. Under such circumstances the court may consider what was the construction put upon the act when it first came into operation.

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Where this has been given by enactment it is conclusive. A contemporaneous construction is that which it receives soon after its enactment. This after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law". Sutherland §307. "The uniform legislative interpretation of doubtful constitutional provisions, running through many years, and a similar construction of statutes, has great weight. The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as controlling evidence of the intention of a particular act." Sutherland §311. "It is to be observed that in the comparison of different statutes passed at the same session or nearly at the same time this circumstance has weight; for it is usually referred to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended". Sutherland §283. "The practical construction given to a doubtful statute by the public officers of the state, and acted upon by the people thereof, is to be considered; it is, perhaps, decisive in case of doubt." Sutherland §309.

In the light of these canons of construction, it is important to examine the interpretations given to the Barrett law by the legislative, administrative and judicial departments of the State during the ten years that elapsed from 1889 to the adoption of the "new" constitution. But my brethren pass by all of these considerations.

In speaking of the judicial history of the State prior to

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1889 they say: "That this court prior to 1889 supported the doctrine that the legislature had constitutional sanction to declare as matter of law that the special benefits to a particular district by an improvement were equally received by bordering property and equal to the total cost, has little force as an argument. The answer to it is that the injustice and hardship resulting from the doctrine, was potential in securing legislative action for the amelioration of the rule." The inquiry being the intent of the legislature, the so-called answer is a begging of the question. The judicial history prior to 1889 is useful in showing a long continued judicial approval of a long continued legislative policy, and in affording the basis for the presumption that no marked contrariety was intended in the Barrett law. But the judicial history since 1889 is more important because the Barrett law itself is involved. This judicial history is found to be a continued approval of a continuation of the long settled legislative policy. Of this, my brethren say: "There is language used in *City of Terre Haute v. Mack*, 139 Ind. 99, and perhaps in other cases in this and the Appellate Court, not necessary to the decision of any question presented by the record, that appears in conflict with what is here decided, but, in so far as such language may so appear, it is disapproved." In the first place, I think that an examination of the cases will show that the language disapproved was necessary to the decision of the questions presented by the records. But, whether the language is disapproved because it is supposed to be *dictum* or because it is thought the cases were wrongly decided, the disapproval can not take those cases out of the judicial history of the State. As contemporaneous expositions of the legislative intent, acquiesced in by the legislature, their force is not dependent upon the correctness of the decisions from the court's present point of view. In *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, May term 1890, this statement was made: "Assessments for street improvements are

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upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an amount equal to the sum assessed against it and that the owners have received peculiar benefits which the citizens do not share in common." In *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, May term 1890, after quoting the extract hereinbefore given from *Garvin v. Dausman*, the court said: "We have no reason to doubt the soundness of the doctrine enunciated in this case, and *under this rule* sections six and seven of this act [the Barrett law] afford the owners of property abutting upon a street to be improved a remedy *which the legislature, in its wisdom, deemed sufficient for their protection.*" In *City of Terre Haute v. Mack*, 139 Ind. 99, May term 1894, a street improvement was made under the provisions of the Barrett law. The assessments were levied against the abutting property by the front-foot rule, except on a lot situated at the corner of another street. In the case of this lot, the amount to be assessed against it as a whole was determined by the frontage rule the same as in the case of other lots abutting on the improved street. By the Barrett law the first fifty feet back from the front line is primarily liable for the assessment and the remainder back to 150 feet is only secondarily liable. The first fifty feet of this lot was owned in three separate parcels. Mrs. Hudson owned the entire frontage. Her parcel extended back nineteen feet. Froeb and Morgan owned the next parcel, extending across the lot, having a width of eighteen and six tenths feet, and fronting on the side street. Mrs. Mack owned the third parcel within the fifty feet, extending across the lot, having a width of twelve and four tenths feet, and fronting on the side street. The engineer, in making his report, apportioned the assessment upon this lot among the three parcels in the ratio of actual benefits. The council, on the "hearing on such report and the assessments therein", approved and confirmed the apportionment by that method. On these facts, the assessment

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against Mrs. Mack's property was declared to be void; and the following principles were established: That the engineer's report is the only legal basis on which any assessment can be made against any land whatever; that no assessment can be made except on an abutting lot; that such assessment can only be by the front foot; that the engineer can not lay nor can the common council adjudge an assessment on any other rule than frontage because no other basis or method is prescribed; that the revision goes only to the correction of errors, as indicated in *Garvin v. Daussman*, 114 Ind. 429. Among other things, the court said: "We have nothing to do with the policy, expediency or justice of the statute. * * * It is a well recognized rule in the interpretation of statutes, that the whole act and all its parts must be construed together so as to give effect to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature. The statute ought to be so construed as to make it a consistent whole. Sutherland Stat. Con., sections 239-246. It appears from the complaint and answer, that the engineer reported an estimate in favor of the contractors against the property-owners benefited thereby, to wit: Mary V. Hudson, on a strip or lot of ground on said Fifth street, 137.96 feet along said street and nineteen feet wide, \$297.06; Froeb & Morgan, a strip or lot 137.96 feet long parallel with said street, 18.6 feet wide, adjoining the strip first described, \$272.10; and Amanda D. Mack, a strip or lot 137.93 feet long, parallel with said street, adjoining the last described strip, and 12.4 feet wide, said strips or lots being lots one and two and a part of lot three, of said Blake's subdivision. *Such an estimate as this the engineer had no right to make.* He was required by the statute, as we have seen, to report the amount of such cost for improvement upon the ground bordering on the improved street, which amount he was required to ascertain and fix by multiplying the average cost price by the number

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of front feet, also the name of the owner of the lot so bordering on said street. The name of the owner of such lot was Mary V. Hudson, and her lot being the only one that bordered on the improved street, the amount due upon it he was required to ascertain and fix by multiplying the average cost price per running foot by the number of running front feet of her lot. And this he was required to report to the common council, and such report the amended seventh section *required* the common council to *approve and confirm, or, in case it was incorrect, to cause it to be amended, and to make the assessment according to such report.* Therefore, if the statute had been followed by the city engineer and common council, the whole amount of cost of the improvement for which the whole 150 feet back from the line of Mrs. Hudson's lot bordering on the improved street could in any event be made liable, would have been assessed against Mrs. Hudson's lot number one. Without the proviso in section three, no person whose lot or ground does not border and abut on the improved part of the street could be made liable for any part of the cost of the improvement in any event. *Ray v. City of Jeffersonville*, 90 Ind. 567. But the proviso makes such land liable only in the event that the lots or parcels preceding it toward the front or border have proved insufficient to pay the cost of the improvement. And the amount for which such ground is in any event made liable is not fixed by any assessment or ascertainment either by the engineer or common council, but it is fixed and ascertained by the balance remaining unpaid of the whole amount assessed on the front lot or parcel after the exhaustion of the parcels that precede it to the front. That can not be known and ascertained until such preceding parcels have been sold. Therefore the act of the engineer in fixing and apportioning any amount against the appellee's lot was without authority of law and void, and the act of the common council in assessing said amount against appellee's lot was void, and she was entitled

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to have it declared so." The engineer having made and the council having confirmed an assessment according to special benefits actually received, and their power to do so having been challenged, I can not see why the language used and a full consideration of the scope and intent of the Barrett law were not necessary to a decision of the question presented by the record. This case was considered from the point of view of Mrs. Mack. Look at it a moment from Mrs. Hudson's standpoint. She owned a parcel of land having 138 feet frontage and nineteen feet depth. The assessment for 138 feet frontage was \$730.21. If her parcel, after being improved, would not sell for enough to pay the assessment, and back-lying parcels had to be sold to make up the deficiency,—and such cases have occurred under the Barrett law,—where do the special benefits come in? Though the legislature should declare as a matter of law, if it had the power, that the special benefits equaled the cost, it would be difficult for any one to point out wherein any special benefits as a matter of fact were derived from the proceeding. In *Keith v. Wilson*, 145 Ind. 149, May term 1896, it was stated: "The law assumes that the property will be benefited to an amount equal to the cost of the improvements thus made." In *Cason v. City of Lebanon*, 153 Ind. 567, it was claimed that a railroad company was bound by a contract with the city to improve the street and that therefore an ordinance *requiring the property owners to pay for the whole improvement* except street and alley crossings was invalid. This court declared that "Said contract did not deprive the city of the power to improve said street in the manner alleged in the complaint, at the expense of the abutting property owners, as provided by law." Though the statute was not particularly discussed in that case, it is sufficiently clear that the court considered, it settled that the law provided for the construction of street improvements, except street and alley crossings, "at the expense of the abutting property owners". In *Sands v. Hatfield*, 7 Ind.

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App. 357, it was decided that, if the engineer omitted from his report any abutting property, the common council, on this fact being shown by objectors at the "hearing", should correct the report and alter the assessments to what they would have been if the engineer had performed his duties properly in the first instance. The Appellate Court, on October 24, 1899, in *Indianapolis, etc., R. Co. v. Capital Paving, etc., Co.* (Ind. App.), 54 N. E. 1076, said: "Conceding that appellant's right of way is 'land' within the meaning of the charter, the question remains whether the right of way lying wholly within Kentucky avenue is within the designation of land abutting or bordering on the same avenue. We think the statement of the question furnishes its own solution. The city can assess only such lands as its charter designates, and, as the charter has designated lots or lands abutting or bordering on the street, none other can be assessed. We are not authorized to give the words used in the statute other than their well-defined and commonly accepted meaning. Conceding, without deciding or assuming, that the company's right of way is benefited by the improvement, the question is still unsolved, because the basis of the assessment is not property that will be benefited, but property that abuts or borders on the street. In authorizing the construction of such improvements, the legislature has assumed that they will benefit that property which abuts or borders on the part of the street improved. The right to impose such a tax is based upon a presumed equivalent. It has not been assumed that any property other than that designated will be benefited. What property the local officers may believe will be benefited is not the question. If a property owner is an abutting owner, he must bear his share of the burden, because the legislature has so directed." So it appears that the judicial department of this State has always hitherto entertained the same belief in regard to the scope and intent of the Barrett law that it did in regard to the street improvement laws prior to 1889. The legislature has

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never indicated any dissent from this judicial interpretation, but on the contrary has shown its understanding and approval thereof.

The legislative department of this State made the method of assessment prescribed in the Barrett law conform to the constitutional requirements concerning taxation and compensation *as that department has always understood them*. That understanding was, in the language of Dillon (quoted in the dissenting opinion in *Norwood v. Baker*, 172 U. S. 269) that "*whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present [then] weight of authority considered to be a question of legislative expediency*". The legislative department of this State has always understood that the only basis for special assessments was special benefits; but that it was a matter of legislative discretion to declare absolutely by law that *the special benefits were always and invariably equal to the cost of the improvement*; that, if in sewer and highway and drainage acts the equality of cost and benefit were not absolutely declared by law but were left open to the determination of the truth by the assessing officers, whose assessment of actual benefits was reviewable before some tribunal duly clothed with power and procedure to that end, it was a matter of legislative grace and not a matter of constitutional compulsion; and that, if the legislature chose to exercise its discretion by declaring that the cost of street improvements should be assessed upon the abutting property by frontage, the citizen could no more complain than in any other case in which the legislature had determined a question of legislative expediency. The Barrett law was enacted in 1889, and it was amended in 1891. It applies to all towns and

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cities not specially classified. In 1891 the legislature passed an act concerning the government and powers of cities of 100,000 population (Indianapolis). Acts 1891 p. 137. On pages 175-181 are the provisions relating to street improvements. The method prescribed is to assess the cost upon the abutting property by frontage; and no provision is made in the act for a "hearing" before the council or board of public works, but the property owners have only the "hearing" described in *Garvin v. Dausman*, 114 Ind. 429. And, although at each subsequent session, acts regarding street improvements have been passed and the charter of Indianapolis has been amended, the legislature has seen no occasion for changing the foregoing method for paying for street improvements. In 1893 (Acts 1893 p. 56) the charter of Indianapolis was so amended that the cost of paving street and alley crossings, which had before been borne by the city was assessed against the property owners; but the charter was left unchanged so far as a "hearing" is concerned. At the same session, on March 3, 1893 (Acts 1893 p. 65), an act was approved relating to the government and powers of cities of 50,000 population (Evansville). On pages 104-110 are the provisions relating to street improvements. These provisions are the same as those in the charter of Indianapolis. On the same day, March 3, 1893 (Acts 1893 p. 202), an act was approved relating to the government and powers of cities of 35,000 population (Ft. Wayne). On pages 243-249 are the provisions relating to street improvements. These provisions are substantially the same as those in the charter of Indianapolis and Evansville, except that the Barrett law is followed in providing for a hearing upon the assessment before the board of public works. The case of *City of Terre Haute v. Mack*, 139 Ind. 99, was decided on October 16, 1894. At the next session of the legislature after this decision, on March 11, 1895 (Acts 1895 p. 239), an act was approved that amended the charter of cities of 35,000 inhabitants so that the total cost of the

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improvement should be assessed by the front-foot rule upon the abutting property back to a line equidistant from the edge of the improved street and the next street parallel to it, but that, *if a lot belonged to different persons*, the assessment thereon should be apportioned among the several parcels *according to the benefits received* from the improvement by reason of being upon, near, or having access to it. Though other acts relating to street improvements were passed at this and each subsequent session, the act last above referred to remains the only instance in which the legislature has undertaken to prescribe the method of having the assessing officers assess and a tribunal determine special benefits *as a matter of fact* in street improvement cases. And though this act is a very limited and imperfect application of the principle, it clearly illustrates two things: First, that the legislature understood the difference between "frontage" and "actual benefits"; second, that the legislature acted, as it always has, upon the assumption, sustained by the then weight of authority, that it was purely a question of legislative expediency whether or not the legislature should declare *as a matter of law* that each front foot was specially benefited to the extent of its *pro rata* share of the total cost. On the same day March 11, 1895, an act was approved that amended the charter of cities of 50,000 inhabitants. Acts 1895, p. 258. Regarding street improvements the charter was so amended as to require the board of public works, after making out the final assessment roll, to give notice of a day "on which said board will receive and hear remonstrances from persons *with regard to their respective assessments*. On the day named in such notice said board shall proceed to hear and determine such remonstrances and may change, modify or confirm the same. Said assessment roll shall contain the names of the property holders and a description of the property assessed for such improvement, and shall contain the *pro rata* assessment against each piece of property. After hearing such remonstrances said department shall de-

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liver *such* assessment roll as modified or confirmed to the department of finance." That the legislature intended in this, as in every other instance in which it was thought worth while to provide a "hearing" before a special tribunal, that the "hearing" should be upon the question whether or not the assessing officers had faithfully performed their duties according to statute and had correctly reported the assessments as determined by the method prescribed for them to act upon,—that the review should be for the purpose of determining the correctness of the view,—is explicitly shown in another provision of this same act. Regarding sidewalk improvements the charter was also amended so as to provide for a "hearing" after the assessment list has been prepared. "Upon the completion of said sidewalk said department shall cause to be prepared an assessment list, and shall notify such owner in the same manner as in this section above provided. Said notice shall fix a time and place when the owner may remonstrate against such assessment. On said day such owner may appear and remonstrate, *and the board shall take final action and shall assess such owner and such real estate for the cost of such improvement.*" On March 15, 1895, an act came into effect by which the charter of cities of 100,000 inhabitants was again amended. Acts 1895 p. 384. Some minor changes were made in respect to collection of instalments of assessments, etc., but the charter was not amended in the matters involved in the amendments of the charter of Ft. Wayne or of Evansville. At the next session on February 23, 1897 (Acts 1897 p. 56), an act was approved whereby the charter of Indianapolis was further amended in reference to street improvements. It is a matter of common knowledge that the practice was generally adopted by city treasurers of notifying property owners by mail of the amounts of their assessments after they came into the hands of the treasurers for collection, and to state in the notice that it was given voluntarily and not as a duty required. This amendment made the giv-

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ing of such notice by mail obligatory upon the treasurer of Indianapolis, and further required him to publish a notice to all persons who had failed to avail themselves of the privilege of paying in instalments that unless payment was made within thirty days proceedings for the collection of assessments would be instituted. On February 26, 1897, the charter of Indianapolis was further amended. Acts 1897 p. 79. Some details about the cost of street and alley intersections, the issue of bonds, and the collection of instalments were changed; but the proceedings for fixing the final assessments by the board of public works were left as they were prescribed in the original act of 1891. At the last session of the legislature, on February 2, 1899, an act came into effect, by which the Barrett law as applied to cities between 5,800 and 5,910 population was amended. Acts 1899, p. 8. It provides for the collection of the total cost, including that of street and alley crossings, from the abutters in proportion to frontage. On March 3, 1899, an act was approved that related to the government and powers of cities of 23,000 population (Terre Haute). Acts 1899 p. 270. In its essential features it is the same as the charters of Evansville and Ft. Wayne. On pages 314-322 are the provisions concerning street improvements. The assessments for that purpose are to be made by the front-foot rule. But the assessments for sewer construction, according to the directions of every one of these acts, are to be laid upon the lands found to be benefited and are to be apportioned according to and not exceeding the special benefits actually received. On the same day, March 3, 1899, an act was approved that again amended the charter of Indianapolis in reference to street improvements. Acts 1899 p. 399. The amendment provides for an appraisal of the abutting property exclusive of improvements, and forbids the ordering of any improvement which, when completed, is to cost more than 25 per cent. of the aggregate appraised value. This still leaves any parcel of abutting property liable to an

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assessment by frontage that might exceed the value of that parcel. And the "hearing" before the council or board of public works as to the correctness of the assessments, on which the present construction of the Barrett law is built up, has remained unprovided for to the end. Is it conceivable that the legislature foresaw the "new" constitution and entertained the deliberate design of making some of these acts constitutional and others unconstitutional? Assuredly not. This whole series of acts, from the Barrett law of 1889 to the last amendment of the charter of Indianapolis in 1899, evidences a continuous and consistent legislative policy. That policy was to put street improvements upon a different basis from sewers and ditches and roads and other like special proceedings. These street improvement statutes are the ones my brethren should have examined, if they were seeking acts *in pari materia* by which to determine the scope and intent of the Barrett law. The sewer and ditch and gravel road laws are only *in pari materia* with the sewer law interwoven in the act of 1889, which my brethren pass by without notice. The legislature never doubted that it had the power to do as it did. It assumed that it was purely a question of legislative expediency to require the whole cost of street improvements to be assessed upon the property by the running foot.

The administrative department of the State, as represented in the various towns and cities, have uniformly acted under the law on the same assumption. It is a matter of common knowledge that the people, the lawyers, the contractors, the municipal officers, the legislature, and the courts, have all been in accord in the understanding that under the Barrett law the city paid for street and alley crossings and the abutters paid the rest of the total cost of street improvements according to a uniform rate per front foot,—until the exigency arose, after the Norwood-Baker decision was studied, of hunting for some other meaning.

If the continuous and consistent interpretation of the

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Barrett law, during all the years since its passage, by all the departments of the State, were looked to, and if the canons of construction as laid down in the books were followed, that construction should be accepted as decisive.

Thus far I have been stating the reasons why I am unable to join my brethren in finding in section seven the "implied power" that authorizes the council to change the basis of the assessments. But it seems to me there is a vital difference between a power and a duty, between the right to do a thing and the obligation to do it. In this case the record shows it is admitted that the council has already decided that it will not accord the property owners a hearing on the question of the amount of special benefits actually conferred by the improvement. Where is the command in the statute that forbids the council from basing the assessments upon the report of the engineer after it has been amended, if necessary, to conform to what the statute commanded the engineer to do in the first instance? If the legislature delegated to the council a discretion in the matter, the property owners could not base a suit for mandatory injunction upon what they deemed a mistaken exercise of that discretion. The statute says that the council "*may* adopt, alter or amend the engineer's report and the assessments therein," not "*shall* change the basis of assessments". The statute *permits* the council to pay all or any part of the total cost of the improvement out of the treasury. This is purely and simply a matter of *option*. If the council paid the total cost, there would be no assessments. If the council determined to pay a certain portion of the total cost, the residue of the total would have to be assessed against the abutting property in the method provided by the statute. In this case the record shows it is admitted that the council has already ordained that the total cost shall be borne by the abutters. Now, if the improvement is to cost \$10,000 and it should be found on the supposed "hearing" that the aggregate of special benefits actually received by the several

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parcels of abutting property was only \$8,000 (though the complaint avers and the demurrer admits that the abutting property is not specially benefited at all as a matter of fact), what good would it do to have the total cost apportioned among the abutters in the ratio of the special benefits as among themselves? Each abutter would find his property assessed with 125 per cent. of his special benefits. So, it becomes necessary to find, both in the law and in appellee's ordinance under the law, not only the right but the duty to pay the \$2,000 excess out of the general treasury, although it is agreed that the city ordered the improvement with the intention, and in the belief that it had the power, to ordain "that the cost and expense thereof, including advertising, labor and material for the same, be assessed against the property on the line". And in the opinion filed by my brethren, though I notice that considerable attention is given to making out the "implied power", I fail to find anything but a fiat that transforms the "implied power" into an "imperative duty".

The views I entertain are supported by authority. In *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, and in *Lyon v. Town of Tonawanda*, 98 Fed. 361, statutes were involved that are essentially the same as the Barrett law; and in *Charles v. City of Marion*, 100 Fed. 538, the Barrett law was considered. I may also cite the last page of my brethren's opinion, wherein the rules regarding "implied powers" are properly indicated.

Not only am I constrained to believe that the Barrett law as enacted is unconstitutional, but I am also of the opinion that the Barrett law as now construed by my brethren is unconstitutional. And I will suggest some of the reasons for thinking so.

The taxing power is committed to the legislative department and can not be conferred upon the judicial. All assessments must be made by administrative officers whose sole authority is to follow with substantial strictness the method

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pointed out by law. The property owner is entitled to a "day in court" to challenge the assessment. The court can not make the assessment, but can only hear the challenge of the assessment already made and then enter judgment confirming or correcting the assessment. If the engineer does not make the assessment as an administrative officer, and if the council does not merely review the assessment as a court, but if on the contrary no assessment is made until the council makes it on the "hearing", the result is either that the assessment is made by a judicial tribunal, or that the "hearing" is for the purpose of enabling an administrative body to determine what assessment to make, with no opportunity for the property owner thereafter to challenge its correctness. A common council may at one time exercise legislative, at another administrative, and at another judicial, functions; but it can not have two or three characters at the same time.

If the prescribed mode of fixing assessments by frontage is deleted from the statute as enacted, there is not a word left limiting the council to any method or prescribing any rule of procedure whatever. There would likely be as many methods as there are towns and cities in the State. Uncertainty would probably prevail until, in suits involving the Barrett law as now construed, this court formulated a definite and uniform procedure. I can not concur in the statement that "The absence of an express rule for guidance in the exercise of the power does not impair it. It is sufficient if the power to change the assessment from the frontage rule exists". Regulations and methods in all tax matters must be prescribed by law. *State Board v. Holliday*, 150 Ind. 216, 42 L. R. A. 826. In the syllabus of *Barnes v. Dyer*, 56 Vt. 469, it is said: "A statute empowering the authorities of a city to construct sidewalks and make local assessments on the property fronting the same 'for so much of the expense thereof as they shall deem just and equitable', is unconstitutional, in that there is no fixed, cer-

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tain, and legal standard for assessment." In *New Brunswick Rubber Co v. Commissioners, etc.*, 9 Vroom 190, 20 Am. Rep. 380, the following appears: "It is not sufficient that the legislative act merely declares that the cost, or a part of the cost of the improvement, shall be assessed upon the lots drained by the sewers to be built. It must, as well, establish some rule—some definite scheme—within constitutional limits, for the apportionment of the tax upon the lands on which such special burthen is imposed. An act of the legislature, directing a tax for a local improvement to be imposed upon particular lands, to be legal or effectual, must consist of something more than a mere authorization to assess a sum of money, the cost of a local improvement upon the designated property—the act must determine the mode of distributing the burthen; the property out of which the tax is to be made must be designated, and some certain standard of assessments established; it cannot properly be left by the *legislature* to the discretion of *others* to fix the method." Courts, for example. A property owner is entitled to a law that operates according to constitutional principles without his intervention. According to the Barrett law as now construed, a property owner does not have a tax that is assessed on the basis of his actual special benefits without affirmative action on his part at the "hearing" to see that it is put on that basis. Further, a lawful assessment must show on its face the principle according to which it is laid. *New Brunswick Rubber Co. v. Commissioners, supra*. This would appear under the Barrett law as enacted, but not as construed. It seems to me that the property owner is subjected to a tax "without due process of law".

The abutters alone are named in the engineer's report. My brethren hold that all such persons are bound by the published notice to know that assessments will be made at the hearing which shall correspond with special benefits actually received. They do not hold, as I understand them, that persons who are not abutters must take notice that their

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back-lying property will be assessed for actual benefits. The Barrett law as enacted made such persons secondarily liable. This was so, as was pointed out in *City of Terre Haute v. Mack*, 139 Ind. 99, not because they were included in the assessment either as made by the engineer or as confirmed by the council, for they were not, but because the statute made them sureties, so to speak. Now, under the Barrett law as enacted, the legislature created a uniform taxing district, over all of which the contractor had his lien. But under the Barrett law as construed, an irregular district is created, without any valid reason inhering in the subject-matter of the act to warrant the irregularity; and the lien of the contractor is to that extent diminished. If A owns a parcel having fifty feet frontage and 150 feet depth, and B owns a parcel having fifty feet frontage and twenty feet depth, and C owns a parcel having fifty feet width and 130 feet depth and lying back of B's parcel, it seems to me that, if A is liable for actual special benefits on his 7,500 square feet, and B is liable on his 1,000 square feet, and C is not liable at all on his 6,500 square feet, not only is the taxing district irregular without reason, but the parties are not subjected to a "uniform and equal rate of assessment".

The notice provided for in section seven is not sufficient to give the council jurisdiction over any subject except "objections" nor any person except one "aggrieved". In *Kuntz v. Sumption*, 117 Ind. 1, 7, 2 L. R. A. 658, the court said of the board of equalization statute: "It does provide notice sufficient for two classes of judgments, but for no others. It provides for notice sufficient as to all general changes in the levy, and sufficient as to all who have complaints to make, and over these matters jurisdiction arises when the notice is given as the statute directs. But there is no provision for notice to the individual taxpayer whose list is to be added to or whose valuation is to be increased.

* * * This notice, it is obvious, can not require every

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taxpayer in the county to be in attendance at the meeting of the board to see that no additions are made to his list."

The contract is made between the contractor and the council for the city. Under the Barrett law as enacted, the liability of the city was limited to the cost of street and alley crossings; and under section seven the council had no discretion, and no duty but to see that the balance of the cost was properly apportioned among the property owners according to frontage. The council, for the city, has control of the expenditure of the general fund; but, under the Barrett law as enacted, no conflict of interest arose among the council and the property owners and the contractor. Under the Barrett law as construed, however, a three-cornered conflict of interests at once arises, and the council is made the exclusive and final judge in its own case. In *Board, etc., v. Heaston*, 144 Ind. 583, 55 Am. St. 192, it was held that a board of county commissioners in allowing or disallowing claims against the county acted merely in the capacity of an auditing committee. The court said: "If it was a suit against the county for the recovery of money in the sense urged by counsel, then the claimant was the plaintiff and the county the defendant, and the commissioners were in the discharge of a double duty: acting as a court; and also as the representative of the defendant, or otherwise the county could not be said to be in court. Such a construction as contended for apparently leads to an absurdity. It would follow that the court and the party defendant were virtually the same. It is an axiom of the law that no man can be a judge in his own case." A proper method of giving the people "due process of law" is illustrated in our statute in reference to the opening of streets. In that statute it is recognized that the general treasury will be subjected to an indefinite liability, and the city is not made the exclusive and final judge in its own case.

On the whole, it seems to me that my brethren in steering away from the rock of Scylla have plunged into the whirlpool of Charybdis.

Pittsburgh, etc., R. Co. v. Hawks.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. HAWKS ET AL.

[No. 18,542. Filed Nov. 22, 1899. Rehearing denied May 8, 1900.]

PRACTICE.—*Harmless Error*.—Where all the evidence admissible under a special answer could have been given under the general denial which was pleaded, sustaining a demurrer to the special answer is not rendered harmful by the subsequent withdrawal of the general denial. pp. 548, 549.

APPEAL AND ERROR.—*Waiver*.—Assignments of error which are not discussed are waived. p. 549.

From the Marion Circuit Court. *Affirmed*.

Samuel O. Pickens, for appellant.

B. K. Elliott, W. F. Elliott and Thomas L. Sullivan, for appellees.

MONKS, J.—Appellant brought this action to enjoin the collection of that part of the cost of the construction of a sewer assessed against appellant's property. Appellee Hawks filed a cross-complaint against appellant to recover said assessment and to foreclose the lien on said property. To this cross-complaint appellant filed an answer in two paragraphs, the second of which was a general denial. Appellee Hawks filed a demurrer for want of facts to the first paragraph of said answer, which was sustained by the court. Afterwards the appellant withdrew the second paragraph of the answer to said cross-complaint, and, refusing to plead further, a judgment and decree of foreclosure were rendered against appellant in favor of said Hawks.

The errors assigned by appellant are: (1) That the court erred in sustaining the demurrer of appellee Hawks to the first paragraph of appellant's answer to the cross-complaint of said Hawks; (2) the court erred in dissolving the restraining order and temporary injunction in said case; (3) the court erred in rendering judgment and decree in favor of appellee Hawks against appellant.

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Pittsburgh, etc., R. Co. v. Hawks.

Appellee Hawks insists that the first paragraph of appellant's answer to the cross-complaint was a mere argumentative general denial, and all the evidence that could have been admitted under said paragraph was admissible under the second paragraph of said answer, which was a general denial, and that there was, therefore, no available error in sustaining the demurrer to said paragraph. Appellant does not claim that said first paragraph of answer was anything more than an argumentative general denial, or that any evidence could have been given thereunder that was not admissible under the second paragraph, but insisted at the oral argument that, as said second paragraph of answer was withdrawn before judgment was rendered, the ruling of the court on said demurrer was harmful. The proper practice in such case is to move to strike out such a paragraph, but it has been uniformly held by this court that, even if a paragraph of answer is sufficient to withstand a demurrer for want of facts, it is harmless error to sustain a demurrer thereto, if the general denial is pleaded and the same evidence is admissible thereunder that could have been given under said special paragraph, and that the subsequent withdrawal of the general denial will not make said ruling, which was harmless when made, a harmful or available error. *Board, etc., v. State, ex rel.*, 148 Ind. 675, 680; *State, ex rel., v. Osborn*, 143 Ind. 671, 680; *Smith v. Pinnell*, 143 Ind. 485, 487; *Baltes v. Bass Foundry, etc., Works*, 129 Ind. 185, 191; *Cincinnati, etc., R. Co. v. Smith*, 127 Ind. 461, 464; *Kidwell v. Kidwell*, 84 Ind. 224, 228; *Reeder v. Maranda*, 66 Ind. 485, 487; *Watson v. Lecklider*, 147 Ind. 395, 397; *Jeffersonville, etc., Co. v. Riter*, 146 Ind. 521, 526; *Harness v. State, ex rel.*, 143 Ind. 420; *Bonebrake v. Board, etc.*, 141 Ind. 62; *Board, etc., v. Nichols*, 139 Ind. 611, 618; *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 233; *Matchett v. Cincinnati, etc., R. Co.*, 132 Ind. 334; *Racer v. State*, 131 Ind. 393, 401; *Butler v. Thornburg*, 131 Ind. 237, 238. It is unnecessary, therefore, to determine

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whether or not said first paragraph of answer was sufficient to withstand the demurrer, for the reason that, under the practice in this State, all the defenses that could have been made thereunder could have been made under the general denial and all the evidence admissible thereunder was admissible under the general denial. Sustaining the demurrer to said paragraph of answer was, therefore, harmless, and, as held by the cases heretofore cited, the subsequent withdrawal of the general denial did not render a ruling harmful and available error that was harmless when made.

The second and third errors assigned present no questions for decision under our practice in a case like this. *Allen v. Studebaker Bros. Mfg. Co.*, 152 Ind. 406, 411, 414; *Tucker v. Hyatt*, 151 Ind. 332, 338, 44 L. R. A. 129; *Seisler v. Smith*, 150 Ind. 88, 90; *Clayton, Adm., v. Blough*, 93 Ind. 85, 95. But if they did, the same are waived by the failure of appellant to discuss the same in its briefs.

Finding no available error in the record, the judgment is affirmed.

MARTIN ET AL. v. MARKS ET AL.

[No. 18,640. Filed May 9, 1900.]

COURTS.—*Tippecanoe Superior Court.*—*Statutory Construction.*—The act of 1875 creating the Superior Court of Tippecanoe county, giving it the same power to grant restraining orders, injunctions, writs of mandate, etc., "as is now or may hereafter be conferred on circuit courts or the judges thereof" gave such court the power to issue writs of mandate and prohibition conferred upon circuit courts by the subsequent act of 1881. *p. 552.*

SPECIAL FINDING.—*Failure of Judge to Sign.*—*Venire De Novo.*—The failure of the trial judge to sign the special finding of facts is not ground for a *venire de novo*, since under such circumstances the finding will be treated as a general finding. *pp. 552, 553.*

SAME.—*Signature of Judge.*—The signature of the judge to the conclusions of law following immediately after the special finding of facts constitutes a sufficient signing of the special finding of facts, where the record shows that the conclusions of law and special finding of facts constituted one written instrument. *pp. 552, 553.*

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INJUNCTION.—Obstruction of Highways.—Action by Private Person.—

The owner of real estate abutting upon a highway has a peculiar and distinct interest in the highway in front of his premises, and may maintain an action for and enjoin the obstruction of such highway, even if it is not upon his real estate, if it materially impairs or interrupts his access to the highway. *pp. 555-556.*

SAME.—Obstruction of Highways.—Damages.—To maintain an action for the removal of an obstruction of a highway adjoining plaintiffs' premises, and for damages, it is not necessary for plaintiffs to show that they were entirely deprived of the means of access to their real estate, but it is sufficient if their means of access have been materially impaired or interfered with. *p. 556.*

SPECIAL FINDING.—Injunction.—Obstruction of Highway.—In an action to recover damages for the obstruction of a highway adjoining plaintiffs' premises and enjoining its continuance, it was not necessary or proper for the court to find the amount the real estate was damaged by the obstruction on the theory that it was permanent. *pp. 556, 557.*

HIGHWAYS.—Obstruction.—Road Supervisor.—A road supervisor may be compelled by mandate to remove obstructions from a public highway in his road district. *p. 558.*

APPEAL AND ERROR.—Assignment of Error.—Special Findings.—

Objections that the special findings contain evidentiary facts, conclusions of law, and are outside the issues in the case, are not presented on appeal by an assignment in a motion for a new trial that the special findings are contrary to law. *p. 558.*

SPECIAL FINDING.—Evidence.—A finding as to the distance defendant's fence encroached upon the highway will not be disturbed on appeal, although no witness testified to the exact distance found by the court, where the distance found was within those testified to by the witnesses. *p. 559.*

HIGHWAYS.—Obstruction.—Injunction.—Action by Private Person.—

The fact that an obstruction in a highway injured others in like manner and degree as plaintiffs, was immaterial so long as the injury was peculiar to plaintiffs, and did not embrace the public in general. *pp. 559, 560.*

SPECIAL FINDING.—Evidence.—Highways.—Obstruction.—

A finding in an action to enjoin the obstruction of a highway with a fence that by reason of the obstruction ingress and egress to and from plaintiffs' premises was more difficult and dangerous, and required more time in effecting a passage through the gateway is sustained by evidence that in driving out of the gate the horses were not disposed to approach near the new fence on account of the barbed wire along the top thereof, that one had to drive carefully, and back, to get

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through the gate into the highway without cramping the wagon, and that they broke corners off of hay-racks in going in, and often had to lift the end of the wagon over to get in. pp. 560, 561.

HIGHWAYS.—Obstruction.—Damages.—Evidence.—Harmless Error.—The admission of evidence as to damages, in an action by abutting owners to enjoin the obstruction of a highway and for damages, on the theory that the obstruction was permanent was cured by the assessment of damages up to the commencement of the action, on the theory that the obstruction was temporary. pp. 561, 562.

SAME.—Obstruction.—Damages.—Evidence.—In the trial of an action by abutting owners to enjoin the obstruction of a highway and for damages, the admission of evidence as to the effect, if any, the continuance of the obstruction would have in diminishing the value of plaintiffs' land was proper. p. 562.

APPEAL AND ERROR.—Motions.—Record.—A motion to modify a judgment and the ruling thereon can only be made a part of the record by a bill of exception or order of court, and where appellants' counsel do not indicate the page and line in the record where such motion and ruling are made a part of the record by bill of exception or by order of court, it will be presumed that the same was not so made a part of the record. p. 562.

From the Tippecanoe Superior Court. *Affirmed.*

J. F. Hanley, W. R. Wood and D. W. Simms, for appellants.

R. P. Davidson and A. Boulds, for appellees.

MONKS, J.—This action was brought by appellees against appellants for a mandatory injunction to compel them to remove a fence constructed by appellant Martin in a public highway upon which appellees' farm abutted, and to prevent them from maintaining the same therein. The separate demurrer for want of facts of each appellant to the complaint was overruled; the cause was tried by the court, a special finding made, and conclusions of law stated thereon in favor of appellees, and, over a motion for a *venire de novo*, a motion for a new trial, and a motion in arrest, judgment was rendered in favor of appellees.

The errors assigned and not waived call in question the conclusions of law and the action of the court in overruling

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the demurrers to the complaint, motion for a *venire de novo*, motion for a new trial, motion in arrest, and motion to modify the judgment.

Appellants insist that the Superior Court of Tippecanoe county had no jurisdiction of the subject-matter of this action, for the reason that said court was created in 1875 (Acts 1875, p. 55), and the act providing that courts shall issue writs of mandate was enacted afterwards, in 1881 (Acts 1881, p. 379, §1181 Burns 1894, §1167 R. S. 1881 and Horner 1897), and gives jurisdiction thereof only to the circuit courts. It is true that said section of the act of 1881, being §1181 (1167), *supra*, provides that: "Writs of mandate and prohibition may issue from the Supreme and circuit courts of this State," but, in addition to the jurisdiction given by other sections of said act of 1875 to said Superior Court, section fourteen thereof expressly gives said court and the judge thereof, in vacation, power "to grant restraining orders, injunctions and writs of *ne exeat*, to issue writs of *habeas corpus*, and of mandate, and prohibition, to appoint receivers, master commissioners, and commissioners to convey real property * * * as is now, or may hereafter be conferred on circuit courts, or the judges thereof." This section not only gives the same jurisdiction over the matters mentioned therein to said Superior Court and the judge thereof as was then vested in circuit courts, but also all jurisdiction over such matters as might thereafter be conferred on the circuit courts. Whatever jurisdiction of said matters, therefore, was conferred on circuit courts by the act of 1881 was by said act of 1875 given to said Superior Court. *Hockemeyer v. Thompson*, 150 Ind. 176. It is clear that said court had jurisdiction over the subject-matter of this action, and did not err in overruling the motion in arrest of judgment, asserting want of jurisdiction as the cause therefor.

The reason assigned for a *venire de novo* was that the special finding of facts was not signed by the judge. If

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there is no signature of the trial judge to the finding of facts and the conclusions of law stated thereon, the same must be treated as a general finding. *Smith v. State, ex rel.*, 140 Ind. 343, 349, and cases cited. The failure of the judge to sign the same, therefore, furnishes no ground for a *venire de novo*. As shown by the record, however, the conclusions of law follow immediately after the special finding of facts, and the signature of the trial judge follows the conclusions of law. The special finding of facts and conclusions of law, as prepared in this case, therefore, constituted one written instrument, which was properly signed as such. *O'Neal v. Hines*, 145 Ind. 32, 37. The motion for a *venire de novo* was properly overruled.

As the questions presented by the demurrers to the complaint and the exceptions to the conclusions of law are the same, a determination of the latter necessarily determines the former.

It appears from the special finding that appellees are, and have been since 1893 or 1894, the owners of real estate abutting upon the east side of a highway in Tippecanoe county for a distance of about 130 rods, and that the only means of ingress to and egress from said real estate is by said highway; that appellant, Martin, is, and has been since 1894, the owner of real estate abutting upon the west side of said highway, adjacent to the real estate of appellees. Said highway was fenced on each side, and the distance between said fences varied, but at no place was the distance less than forty feet, nor more than forty-four feet; that said highway was worked and graded, and ditches were made on each side, and by reason of said side ditches, and the action of the water, and the wear of travel, there were left, twenty-five or thirty years ago, on each side of the traveled way, and outside of said side ditches, well defined banks, of greater or less height, in places as much as four feet, and usually abrupt and nearly perpendicular, on the top of which banks stood the fences bounding said highway. In 1896 appellant,

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Martin, was appointed supervisor of the road district in which said highway is located, and in May, 1896, and while supervisor of said road district he tore down the fences along the west side of said highway the entire distance his land abutted thereon, and unlawfully, and with force, erected a new and very strong and substantial fence within the limits of said highway for the same distance. This fence was made of strong posts deeply set in the ground, upon which was placed woven wire, and above said woven wire were two barbed wires; that by the erection of said fence said appellant, Martin, unlawfully took from the width of the highway on the west side thereof, and enclosed the same as a part of his farm, a strip of ground five feet wide at the south end of the new fence, about nineteen feet in width at appellees' barn-lot, sixteen feet in width opposite appellees' gate, and eleven feet at the north end of said new fence; that said new fence was built a part of the way near the middle of the graveled part of the road, and the distance between said new fence and the fence on the east side of the road at the narrowest part, was only twenty-one feet; that at the point opposite the gate leading into appellees' farm, and to their barn and dwelling thereon, the distance between the new fence and appellees' fence was twenty-four feet. After completing his fence appellant, Martin, resigned his office of supervisor of said road district and appellant, McCleve, was appointed his successor. Before the commencement of this suit appellees notified said McCleve, and requested him, as such supervisor, to remove said fence from said highway, which he refused to do; that appellees, by reason of said obstruction of said highway, have sustained and do now sustain, a special injury not common to the general public; that it has made ingress to and egress from their farm more inconvenient, difficult, and dangerous; that in going in and out of appellees' farm it requires more care and time, and is attended with more danger of breakage and loss on account of said obstruction than before its erection;

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that the continuance of said obstruction will diminish the rental value of appellees' farm \$35 per annum, and will depreciate the market value of said farm to a marked extent; that appellees have sustained damages by reason of said obstruction, up to the time of the commencement of this action, in the sum of \$25.

The conclusions of law stated were: (1) That the obstruction on said highway is a public nuisance, and should be abated by the order and decree of court; (2) that there should be a decree directing appellant, Martin, to abate and remove said nuisance, and enjoining him from renewing and continuing the same; (3) that appellees are entitled to an order and decree against appellant, McCleve, as supervisor, to remove said fence, and abate said nuisance; (4) that appellees are entitled to judgment against appellant, Martin, for \$25 damages.

It is conceded by counsel for appellants that the erection of said fence in the public highway was a public nuisance, even though it did not operate as an obstruction to public travel. This is the settled law in this State. *City of Valparaiso v. Bozarth*, 153 Ind. 536, and cases cited. It is also true that a public nuisance cannot be enjoined at the suit of a private person. *McCowan v. Whitesides*, 31 Ind. 235; *Fossion v. Landry*, 123 Ind. 136. A private person can, however, maintain an action for the obstruction of a public highway, if he thereby sustains some particular or peculiar injury different in kind and not common to the general public. *Pittsburgh, etc., R. Co. v. Noftsgger*, 148 Ind. 101, 104, 105, and cases cited; *Matlock v. Hawkins*, 92 Ind. 225, 228; *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123, and note pp. 132-135; *McCowan v. Whitesides*, *supra*; *Pettis v. Johnson*, 56 Ind. 139; *Fossion v. Landry*, *supra*.

It is also held in this State that a person owning real estate abutting on a highway may maintain an action for and enjoin the obstruction of said highway immediately in front of said real estate, even if the obstruction is not upon

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his real estate, if it materially impairs or interrupts his access thereto. *Pittsburgh, etc., R. Co. v. Noftsgger, supra*, and cases cited; *McCowan v. Whitesides, supra*; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 546; *Pettis v. Johnson, supra*; *Egbert v. Lake Shore, etc., R. Co.*, 6 Ind. App. 350.

The owners of real estate abutting upon a highway have a peculiar and distinct interest in the highway in front of their real estate; this interest includes the right to have the highway kept open and free from any obstructions which prevent or materially interfere with the ordinary means of ingress to and egress from said real estate. Any permanent obstruction of a public highway is a nuisance, and, if it obstructs or materially impairs or interferes with the means of access to the abutting real estate, the owners of said real estate suffer a peculiar and particular injury, different in kind from the public generally. In such case the owner of such real estate may maintain an action for damages and to enjoin such obstruction, whether the obstruction is on the part of the highway laid upon his real estate or not. *Indiana, etc., R. Co. v. Eberle, supra*, and cases cited. To maintain such an action, it is not necessary for the abutting landowner to show that he has been entirely deprived of the means of access to his real estate, but it is sufficient if his means of access thereto have been materially impaired or interfered with. *Indiana, etc., R. Co. v. Eberle, supra*; *Pittsburgh, etc., R. Co. v. Noftsgger, supra*; *Egbert v. Lake Shore, etc., R. Co., supra*.

The facts stated in the special finding show that the fence was built in the public highway in front of appellees' real estate, which abutted thereon, and that said fence materially impaired and interfered with their means of access thereto, and that the result of the impairment and interference with such right, if allowed to continue, will be the depreciation in the annual rental value of said real estate, and also its market value, and that appellees' damages up to the commencement of this action are \$25. Such facts show that

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appellees have suffered a peculiar and particular injury different in kind from that which is suffered by the community in general. *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 546, 547, 549.

As this action was to recover damages for said obstruction, and compel its removal and enjoin its continuance, it was not necessary or proper for the court to find the amount said real estate was damaged by said obstruction upon the theory that it was permanent. The complaint did not recognize the right of appellants to maintain said obstruction, and continue the use of the part of the highway wrongfully appropriated, but demanded the removal of said obstruction. All that the court was required or authorized to find was the amount of appellees' damages to the commencement of this action, and what effect, if any, the continuance of said nuisance would have on the value of said real estate. *Indiana, etc., R. Co. v. Eberle, supra*, p. 551.

It is stated in the special finding that after said obstruction was placed in said highway by appellant Martin, appellees placed a gate in the fence on the east boundary of said highway, through which to pass to and from their land, and that said gate was ten feet wide,—one foot narrower than the average width of farm gates in that neighborhood. Appellants insist that this finding shows that the impairment and interference with access to appellees' said real estate was occasioned, in part at least, by their own act in constructing the gateway too narrow. A gateway ten feet wide was wide enough to furnish convenient access to appellees' farm from the highway, as it was before said fence was unlawfully placed therein, and they had the same right to erect a gate of that width after the unlawful act of appellant as they had before.

It is next insisted that this action cannot be maintained, for the reason that other adequate remedies are given by §§2043, 2148, 6831, 6837, 6838 Burns 1894, §§1964, 2061, 5080, 5087, 5088 Horner 1897.

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Section 6831 (5080) *supra*, did not require appellees to remove said obstruction, if it was placed and maintained in said highway by appellant Martin unlawfully and by force, as alleged in the complaint and stated in the special finding. Said section does not furnish appellees any adequate remedy for the wrongs alleged and found. Appellants, under the facts found, are not in a position to urge that appellees should have removed said obstruction,—in other words, perform a duty imposed by law upon the supervisor and the person who placed the same in the highway. The fact that appellant, Martin, who erected said obstruction, and his co-appellant, as road supervisor, may be liable to indictment and punishment, or to a penalty or forfeiture which may be recovered in a civil action,—the first for obstructing said highway, and the latter for his failure to perform a plain duty imposed by law of removing said obstruction, and suing said Martin for said obstruction, furnishes no reason why appellees cannot maintain this action. Such remedies would not compel the removal of said obstruction, and they are not, therefore, adequate. *State, ex rel., v. Kamman*, 151 Ind. 407, 410, 411, and cases cited.

It was held in *State, ex rel., v. Kamman, supra*, that a road supervisor could be compelled by mandate to remove obstructions from a public highway in his road district. Under the facts found, it was the duty of appellant, McCleve, as road supervisor, to remove said obstructions from said highway. No question is presented by the assignment of errors concerning appellees' right to sue appellants in the same action. The conclusions of law were not erroneous.

It is next insisted that the court erred in overruling the motion of appellant Martin for a new trial.

The first cause assigned for a new trial is that the special findings are contrary to law. Under this specification certain findings are objected to by appellant because they contain evidentiary facts, conclusions of law, and are outside the issues in the case. No question concerning such defects, if they exist, is presented by said specification.

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The second cause for a new trial is that certain special findings are not sustained by sufficient evidence. Some of the special findings, so challenged, go to the question of the location of the fences along said highway through the land owned by appellant and appellees before the alleged obstruction by appellant, how long said fences had been erected and maintained, and how much the new fence erected by appellant encroached upon said highway. Some witnesses testified that the fences were constructed on each side of said highway prior to 1844, and had remained on the same line from that time until appellant tore down the old fence, and built the new one which obstructed the highway,—a period of forty-five to fifty years. Other witnesses testified that the fence on appellant's side of the road had been moved back from the highway several times—in all about four feet—within twenty years before the trial of the cause. A number of witnesses testified as to the extent the new fence encroached upon the highway, but their evidence was conflicting. No witness testified that the new fence was sixteen feet within the highway opposite appellees' gate, as found by the court in the special finding, some placing the distance more, and others less than that found by the court. No witness had measured the distance, but each gave his judgment of the distance from observation, and that it was "about" a certain number of feet at each point. Upon such evidence we cannot disturb a finding of distance within those testified to by the witnesses. The court having found the number of feet the same encroached upon said highway at the different points, and when and where the fences on each side of said highway were built and maintained, and there being evidence which supports said finding, this court cannot disturb the same, although there was evidence to the contrary. *Lawrence v. Van Buskirk*, 140 Ind. 481, 483. The court found that no other farm residence, barn, or barn-lot, or other domestic arrangement than those of appellees', are along said highway where the new fence was erected. It is not material

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whether there was any evidence to support this finding or not, for the reason that if said finding was eliminated or disregarded the conclusions of law stated by the court would not be affected thereby. The fact that said obstruction injured others in like manner and degree as appellees is immaterial so long as the injury was peculiar to them, and did not embrace the public in general. *McCowan v. Whitesides*, 31 Ind. 235.

The court found that by reason of said obstruction ingress to and egress from appellees' premises is more difficult and dangerous, and requires more care and time in effecting a passage through said gateway, and is attended with more danger of breakage and other loss. Appellant insists that the evidence does not warrant this finding. Witnesses testified that in driving out at the gate horses were not disposed to approach near the new fence on account of the barbed wire along the top thereof, that they had to drive carefully with a wagon, and back, to get out through the gate into the highway without cramping the wagon, and that in hauling posts and corn through said gate they could hardly get in and out, and that in driving through with hay-ladders loaded with straw or hay the hind wheels or ladders would generally catch on the posts, and that they had trouble nearly every time in getting out; that they broke corners off of hay-ladders in going in, often had to lift the end of the wagon over to get in; that they did not believe one could get through with hay-ladders unless they were narrow; that an engine, clover-huller, and wagon attached went in and out at said gate, except that they had to lift the wagon around as they went in and also as they went out; that, if the highway had not been obstructed, they would have had a turning way at the gate of about forty feet, and that the distance from the gate to the new fence was only about twenty-four feet.

One witness testified that he "had hay-ladders on a wagon coupled ~~sixteen~~ feet long, and got fast in going in at the

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gate"; that he "could have got in had the gate been twelve or thirteen feet wide; that, if the highway had remained its former width, one could turn in at the gate all right; that when he pulled up across the gateway, and turned and backed, he pulled in without striking the posts; that, if the highway had remained its former width, one could turn in at the gate without difficulty." While there is some conflict in the evidence as to the facts stated in said finding, there is evidence which, if true, sustains the same. In such case this court cannot weigh the evidence. There was evidence that a gate ten feet wide was sufficient to enable vehicles, loaded and unloaded, to pass to and from said farm through said gate without danger or difficulty, if the road had remained as it was before the new fence was built. Appellant's unlawful act in obstructing said highway imposed no duty on appellees to erect a gate of any greater width than would have been necessary if the obstruction had not been erected, and the highway had remained its original width. If appellees had left an opening twenty or twenty-five feet wide where the gate was, they might have passed to and from their farm without danger or difficulty if said highway had been obstructed so that it was only fifteen feet, or even less, in width at that point; but such fact does not require appellees to provide such an opening. They have the right to improve their farm the same as if appellant had not unlawfully obstructed said highway, as found, and if, when they do so, their means of access is materially impaired or interfered with by said obstruction, they are entitled to maintain an action therefor.

Appellants urge that the court erred in admitting evidence of damages to said farm on the theory that said obstruction was permanent. If such evidence was admitted, it was harmless, for the reason that the court assessed the damages at \$25 up to the commencement of this action, on the theory that the obstruction was not permanent, but temporary. The trial court, in assessing the damages up to the commence-

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ment of this action, followed the rule declared in *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 551; *City of Ft. Wayne v. Hamilton*, 132 Ind. 487, 493. It was proper, however, for the court to admit evidence concerning the effect, if any, the continuance of the obstruction would have in diminishing the value of appellees' land. Objection is made by appellant to evidence admitted by the court, on the ground that the same was outside the issues, and that without said evidence the damages assessed are excessive. If said evidence and any finding predicated thereon is disregarded, the conclusions of law would be the same. There was evidence within the issues in the cause which sustains the amount of damages assessed.

It is urged that the court erred in overruling the motion of appellant Martin to modify the judgment. Such motion and the ruling thereon can only be made a part of the record by a bill of exceptions or order of court. *Ewbank's Manual* §26 p. 31; *Hamrick v. Loring*, 147 Ind. 229, 232, and cases cited. As counsel for said appellant have not indicated the page and line where said motion and the ruling thereon, if any, are made a part of the record by a bill of exceptions or order of court, we assume that the same were not so made a part of the record. *State v. Winstandley*, 151 Ind. 495, 501, 502. The record, therefore, presents no question concerning the correctness of the action of the court in overruling said motion. Finding no available error in the record, the judgment is affirmed.

ROUSH ET AL. v. ROUSH.

[No. 13,723. Filed Jan. 10, 1900. Rehearing denied May 9, 1900.]

EASEMENTS.—Quieting Title.—Complaint.—A complaint in an action to quiet title to an easement in a way adjoining plaintiff's premises, and to remove an obstruction placed there by defendants, which shows that plaintiff was entitled to use the way is good as against a demurrer. *pp. 564, 565.*

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161	523

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VERDICT.—Easements.—Quieting Title.—A verdict in an action to quiet title to an easement in a way, and to remove obstructions placed there by defendants, that the jury find for the plaintiff, that said obstruction should be removed and plaintiff's easement in the alley quieted, and that they find against defendants on their cross-complaint, is a general verdict, determining all of the material issues in favor of plaintiff. *pp. 565, 566.*

INTERROGATORIES TO JURY.—General Verdict.—Conflict.—Answers to interrogatories cannot be aided by any presumptions or intendments as against a general verdict. *p. 566.*

SAME.—General Verdict.—Easements.—Quieting Title.—An answer to an interrogatory in an action to quiet title to an easement in a way and to remove an obstruction placed there by defendants that the parties under whom plaintiff claimed title had conveyed the right of way over the same strip of ground to a third party is not in irreconcilable conflict with a general verdict for plaintiff. *p. 566.*

CONTRACTS.—Construction by Parties.—Where parties have by their acts and conduct given their contract a certain construction, the courts will, ordinarily, adopt that construction. *pp. 569, 570.*

EASEMENTS.—License.—Where the owners of real estate abutting an alley erected buildings and made improvements on the real estate with reference to the alley, with the knowledge of each other, they cannot be deprived of the use thereof although they had merely a license to use the way. *p. 570.*

EVIDENCE.—Quieting Title.—Easements.—In an action to quiet title to an easement in a way alleged to have been located by deeds, evidence as to the number of years the way had been used, as such, was properly admitted for the purpose of showing the construction given the deeds by the parties and those holding under them, although it was not alleged that plaintiff had title to the way by prescription. *pp. 571, 572.*

TRIAL.—Admission of Evidence.—It is within the discretion of the court to admit original testimony after the evidence and argument have been closed, and a cause will not be reversed for that reason unless it clearly appears that such discretion was abused. *p. 572.*

MISCONDUCT OF COUNSEL.—Instructions.—The refusal of the court specifically to instruct the jury to disregard a remark made by counsel was not error, where the jury were instructed generally not to pay any attention to side remarks in the case. *pp. 572, 573.*

INSTRUCTIONS.—Harmless Error.—Available error cannot be predicated upon the action of the court in giving or refusing to give instructions where the answers to interrogatories show that the complaining party was not injured thereby. *p. 573.*

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From the Huntington Circuit Court. *Affirmed.*

J. B. Kenner, U. S. Lesh and B. M. Cobb, for appellants.

James C. Branyan and John S. Branyan, for appellee.

MONKS, J.—Appellee brought this action to quiet her title to an easement in a way ten feet wide on the north side of her real estate, and to remove an obstruction placed there by appellants. Appellants' demurrer to the complaint was overruled. Appellants filed a cross-complaint alleging that they and their grantors had been in quiet, peaceable, exclusive, and uninterrupted possession of the real estate in dispute for more than twenty years before the commencement of the action, and asking that their title thereto be quieted. The case was put at issue, and a trial thereof by the court resulted in a finding and judgment in favor of appellee. Appellants obtained a new trial as of right, and the cause was tried by a jury, and a general verdict returned in favor of appellee. Answers to interrogatories submitted by the court were also returned with the general verdict. Over a motion by appellants for a judgment on the interrogatories, notwithstanding the general verdict, and a motion for a new trial, judgment was rendered on the verdict in favor of appellee.

The assignment of errors calls in question the action of the court in overruling the demurrer to the complaint, appellants' motion for a judgment on the answers to the interrogatories, notwithstanding the general verdict, and appellants' motion for a new trial.

It is alleged in the complaint, among other things, "that appellee and her husband, under whom she holds title, have owned certain real estate [describing it] for more than twenty-seven years, and for more than twenty-five years there has been an alley, ten feet wide, along the north side thereof, between the lands of appellee and the lands owned by appellants, dedicated by deed; that said alley has been open and used by appellee and appellants for more than twenty-five years, and a fence run along each side thereof,

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and buildings have been erected, and improvements made with reference to where it is now and has been for twenty-five years, and the same has been used by the owners of said lands as an appurtenant way during said time, and by others for egress and ingress, and is necessary to the enjoyment and use of their said properties, and was there located by deed of the parties under whom appellants claim title for more than twenty-five years last past, and was so of record when appellant, Matilda Roush, purchased the land which she has on the north side of said alley; and that said alley was there located, opened, and used when she and her husband entered into the possession thereof, as they well knew." Said allegations show that appellee, as the owner of real estate abutting on said way, was entitled to the use of the same, and therefore entitled to have the obstruction placed there by appellants removed. If appellants desired said allegations made more specific and certain in any way, a motion to make more specific, and not a demurrer for want of facts, was the remedy.

It is next insisted by appellants that the court erred in overruling their motion for a judgment in their favor on the answers to the interrogatories. Appellants claim that "the verdict is not a general verdict, but only finds a few facts specially." The verdict is as follows: "We the jury find for the plaintiff against the defendants, that they have obstructed the alley described in the complaint, that said obstruction should be abated and removed therefrom, and that plaintiff's easement in said alley should be quieted thereto, and we find for plaintiff against defendants, on the cross-complaint. [Signed] E. Brightmore, Foreman of Jury." The part of the verdict which precedes the first punctuation mark is a general finding in favor of appellee against appellants. Then follows a finding as to the obstruction of the alley, and that the same should be removed, which is followed by a general finding in favor of appellee and against appellants on their cross-complaint. The verdict is clearly a general one de-

termining all material issues in favor of appellee, and, unless the answers of the jury to the interrogatories are in irreconcilable conflict therewith, the court did not err in overruling appellants' motion for a judgment in their favor. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 300, and cases cited.

Appellants call attention to one interrogatory only, which they claim is in conflict with the general verdict. This interrogatory sets out what purports to be a copy of a deed made by Charles Bickle and Anton Roush in 1868, conveying to William and James Ewing the right of way over a strip of ground ten feet wide on out lot two in the original plat of the town of Huntington, describing it; the east end of said strip being the west end of the right of way conveyed by said Ewings to said Roush and Bickle, and the west end thereof, Cherry street. The jury found in answer to said interrogatory that said deed was executed and delivered by the grantors to the grantees named therein on November 29, 1868. The rule is that answers to interrogatories cannot be aided by any presumption or intendments, but that all reasonable presumptions must be indulged in favor of the general verdict. *Consolidated Stone Co. v. Summit*, *supra*, p. 301, and cases cited. Under the rule stated, the fact that such a deed was executed is not in irreconcilable conflict with the general verdict.

It is next insisted that the court erred in overruling the motion for a new trial. The first and second causes for a new trial are, that the verdict is not sustained by sufficient evidence, and that the same is contrary to law. While there is a conflict in the evidence as to some of the facts, there is evidence which shows that out lot two in the original plat of the town of Huntington abuts upon Jefferson street on the east and Cherry street on the west; that a part of said out lot, 132 feet north and south, abutting on Jefferson street and extending back the same width 140 feet and three inches, was, on and before November 29, 1868, the

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property of James and William Ewing, the north half thereof being the property of James, and the south half being the property of William; that the part of said out lot immediately west of the part belonging to the Ewings, being 132 feet north and south, and extending from the Ewing property west to Cherry street, was, on and before said date aforesaid, the property of Charles Bickle and Anton Roush, seventy-three feet off of the north side of said tract belonging to said Bickle, and the remainder, being fifty-nine feet off of the south side, belonging to said Roush. The deed to Anton Roush for said fifty-nine feet was executed in 1867 by Tuisch and wife, and immediately below the description of the real estate it contained the following provision: "And said party is to grant a right of way on the north side of said fifty-nine feet, to be five feet wide, for an alley." The north line of a way ten feet wide—five feet on each side of the line between the real estate of appellants and appellee,—extending from Cherry street to the west boundary of the real estate of the Ewings, would be seven feet south of the north line of the way on the line between the real estate of the Ewings as described in their deed to Bickle and Roush, and this would only leave a space of three feet between the north line of such way on appellants' and appellee's real estate and the south line of the way on the Ewings' real estate to pass through. A way so opened from Jefferson street to Cherry street could only be used by persons on foot and on horseback, on account of the width being only three feet where said ways would meet if so opened. The four parties, for the purpose of having a private way extending from Jefferson street to Cherry street, so that it could be used for ingress and egress to and from the real estate abutting thereon, on November 29, 1868, executed two deeds. One was executed by James and William Ewing to Charles Bickle and Anton Roush, conveying to them the right of way over a strip ten feet wide running from Jefferson street west 140 feet and three inches, one-half of said

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way to be on each side of the line dividing the lands of James and William Ewing, "said right of way to be used by said Roush and Bickle for ingress and egress to and from their property at the west end of said strip, on foot or horseback or with empty wagons, but said grantees are not to pass over said strip with loaded wagons or drays." The deed from Bickle and Roush to the Ewings conveyed a right of way ten feet wide commencing at the west end of the way conveyed by said Ewings to Bickle and Roush, the center of which way was sixty-six feet south of the north line of said out lot two, and running from said point in a westerly direction to a point on the west line of said out lot on Cherry street seventy-three feet south of the northwest corner of said out lot, said strip "to be used by said Ewings for the purpose of ingress and egress to and from their said property at the east end of said strip, on foot, on horseback, and with empty wagons, but the said grantees are to have no right to pass over the said strip with loaded wagons, carts, or drays." The way described in said deeds was open from Jefferson to Cherry street, and was fenced on each side from Cherry street east to the west end of the way described in the deed from Ewings to Bickle and Roush, when said deeds were executed, and has been used at all times since—a period of more than twenty-five years—as a private way for the benefit of the real estate abutting thereon, and the owners and occupants of said real estate, until 1895, when it was obstructed by appellants building a fence therein without the consent of the other owners of the real estate abutting on said way. A part of the time the Ewings have maintained gates or bars across said way at the eastern and western boundaries of their said real estate, and the owners of the real estate abutting on said way west to Cherry street have maintained a gate across said way at Cherry street during a part of the time since the execution of said deeds in 1868. No gates or bars have been maintained across said way at any time for the last five years. Said way

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so located, opened, and used, has been recognized as the boundary line by the owners of said real estate since the execution of said deeds in 1868. Buildings have been erected and improvements made upon the real estate abutting upon said way with reference to the same and its location and use. On May 13, 1875, John Roush and wife executed a deed conveying to appellant, Matilda Roush, that part of said out lot two which was owned by Charles Bickle in 1868, when the deeds for said way were made, which deed reserved five feet for an alley along the south side thereof. Anton Roush died testate in 1895, and by his will, which was duly admitted to probate, he devised his part of said out lot two to appellee during her life.

Substantially the same facts concerning said way were found by the jury in answer to the interrogatories submitted by the court. Under said facts appellee was clearly entitled to use said way, and appellants were guilty of an actionable wrong in obstructing the same.

The deed executed by Bickle and Roush and the deed executed by the Ewings must be construed together as one instrument in the light of the surroundings of the parties and the facts and circumstances of the case, and, when so construed, it is clear that the said way from Jefferson street to Cherry street was appurtenant to the real estate abutting thereon, and that the same was to be used as a means of ingress to and egress from said real estate, subject to the limitations mentioned in said deeds. Moreover, the parties who executed said deeds, and those holding under them, by their acts and conduct in fencing said way on each side thereof, and using the same from 1868 to 1895, a period of twenty-seven years, for ingress to and egress from said real estate abutting thereon, and erecting buildings on and improving said real estate with reference to said way, have so construed said deeds. The ordinary rule is that where parties have, by their acts and conduct, given their contract a certain construction, the courts will adopt that construc-

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tion. *Bever v. Bever*, 144 Ind. 157, 164; *Frazier v. Myers*, 132 Ind. 71, 72, and cases cited; *Ingle v. Norrington*, 126 Ind. 174, 176; *Louisville, etc., R. Co. v. Reynolds*, 118 Ind. 170, 173; *Dwenger v. Geary*, 113 Ind. 106, 122, and cases cited; *Lyles v. Lescher*, 108 Ind. 382, 385, 386; *Johnson v. Gibson*, 78 Ind. 282; *Childers v. First Nat. Bank*, 147 Ind. 430, 436. Said way cannot, therefore, be closed or obstructed without the consent of all of said owners. Moreover, while using said way, and on the faith thereof, they have erected buildings and made improvements on said abutting real estate with reference to said way with the knowledge of each other, and under such circumstances the abutting owners cannot be deprived of the use thereof without their consent, even though said deeds were merely a license to use said way, or there was a mere oral license to use said way. *Robinson v. Thraikill*, 110 Ind. 117, 118, and cases cited; *Joseph v. Wild*, 146 Ind. 249, 253, 254, and cases cited; *Noble v. Sherman*, 151 Ind. 573, 574; *Rerick v. Kern* (Pa.), 14 Serg. & Raw. 267, 16 Am. Dec. 497, and note pp. 501-506.

It will be observed that the deed of Tuisch and wife to Anton Roush does not reserve five feet off of the north side of the real estate conveyed for an alley, but only provides that "said party is to grant a right of way on the north side of said fifty-nine feet to be five feet wide, for an alley." At the time the deed was executed, Bickle was the owner of the part of said out lot two immediately north of the part conveyed by said deed to Roush. It is not shown that Tuisch, the grantor, ever demanded of Roush that he grant or give a right of way on the north side of the fifty-nine feet conveyed to him, and there is no evidence in the record showing that any other person had any right to demand such a grant, or the right to use said strip of five feet. The fact that such a provision was contained in said deed does not change the legal effect of the two deeds for said way, or the construction given them by the acts of the parties in open-

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ing, using, and fencing the same on both sides as described in said deeds, and in improving the said real estate with reference to said way.

The deed to Matilda Roush for the part of said out lot conveyed to her was executed in 1875, long after the deeds for said way were made and recorded, and after the same had been opened and the fences built; and the reservation of the five feet along the south side for an alley can in no way affect the way as then located and used. Whatever title said appellant acquired to said real estate under said deed was subject to the way existing thereon at the time of said purchase. *Bales v. Pidgeon*, 129 Ind. 548; *Ellis v. Bassett*, 128 Ind. 118; *Fankboner v. Corder*, 127 Ind. 164. Moreover, the use of said way by the abutting owners as it existed when said appellant received her deed continued until appellants obstructed the same in 1895. It follows, therefore, that the verdict is sustained by sufficient evidence, and the same is not contrary to law.

A number of causes assigned for a new trial on account of the admission of evidence over appellants' objections are predicated upon the theory that appellee and those under whom she holds acquired no interest in the way conveyed by said deeds, or by virtue of the location and use of said way, and the improvement of her real estate with reference to said way. What we have said concerning said deeds and the facts established by the evidence disposes of all such causes for a new trial.

Several causes for a new trial call in question the action of the court in allowing witnesses to testify, over appellants' objection, to the number of years said way had been used as such. This was not error, although it was not alleged in the complaint that appellee had title to said way by prescription. Under the allegations of the complaint, appellee had the right to prove the length of time said way had been used as such, that the same had been fenced on each side, where the fences were located, and all other facts

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heretofore stated as having been proved by evidence in the cause. Such evidence was proper to show the construction given said deeds by the parties and those holding under them, as well as for other purposes. The twelfth, thirteenth, fourteenth and fifteenth causes for a new trial call in question the action of the court in permitting witnesses called after appellants had closed, their evidence to testify to certain facts which it is claimed were only admissible in chief. It is not necessary to decide whether or not such evidence was original or rebuttal in its character, because it was within the discretion of the trial court to admit original testimony, even after the evidence and argument have been closed, and a cause will not be reversed for that reason unless it clearly appears that such discretion was abused. *Kahlenbeck v. State*, 119 Ind. 118, 122, 123, and cases cited; *McNutt v. McNutt*, 116 Ind. 545, 565, 2 L. R. A. 372; *Stipp v. Claman*, 123 Ind. 532, 538. The record does not disclose any abuse of discretion in admitting said evidence.

At the close of the evidence in the case, as the jury was about to be sent to view the premises, appellee's counsel said: "We want to ask Mr. Roush one question as to whether he has not been digging there in that alley this morning, and if it was not for the purpose of manufacturing testimony?" Counsel for appellants thereupon moved the court to instruct the jury that the remark made by counsel for appellee should be disregarded by them. The court said: "I have instructed the jury that they should not pay any attention to side remarks in the case." Appellants then moved the court specifically to instruct the jury to disregard the remark just made by appellee's counsel, and the court failing to give such specific instruction appellants excepted. This ruling of the court is assigned as a cause for a new trial. The instruction given called the attention of the jurors to the fact that he had already instructed them to pay no attention to such remarks, and, in effect, repeated this instruction to them. This was clearly as

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specific and effective as to have instructed the jury to disregard the remark. The instruction of the court was sufficient to counteract the harmful effect, if any, of said remark, for we must presume that the jurors were men of average common sense and ordinary intelligence, and that they understood and obeyed said instruction.

The correctness of each instruction given to the jury and the action of the court in refusing to give each of certain instructions requested by appellants are severally challenged by a number of causes assigned for a new trial. Such of said causes as are not disposed of by what we have said concerning the deeds for said way, and the construction given thereto by the acts and conduct of the parties, and the evidence being sufficient to support the verdict, are not available, because the answers of the jury to the interrogatories submitted to them show that appellants were not injured by the giving or refusal to give any of such instructions. Under such circumstances, errors in giving or refusing to give instructions are harmless, and therefore furnish no ground for reversal. *Sievers v. Peters, etc., Co.*, 151 Ind. 642, 662; *Ricketts v. Harvey*, 106 Ind. 564; *Cline v. Lindsey*, 110 Ind. 337, 348; *Moore, Adm., v. Lynn*, 79 Ind. 299; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 272, 273, 54 Am. Rep. 312.

It follows that the court did not err in overruling the motion for a new trial.

Judgment affirmed.

WHITNEY v. THE STATE.

[No. 19,207. Filed May 10, 1900.]

CRIMINAL LAW.—*Evidence.*—*Cross-Examination.*—A question asked a witness for the State on cross-examination if he and another boy did not stone the house of defendant's brother, where defendant was staying, was not competent as showing hostility of the witness to defendant. pp. 576, 577.

154	573
157	26
157	462
154	573
154	636
154	662
155	575
155	581
154	573
158	165
154	573
159	387
154	573
161	365

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EVIDENCE.—Objections.—Where an objection is sustained, if it appears that the evidence was inadmissible for any reason, and the decision excluding it was correct, it makes no difference whether the ground of objection was sufficient or not. *pp. 577, 578.*

CRIMINAL LAW.—Evidence.—Cross-Examination.—A question asked a witness for the State on cross-examination for the purpose of showing the ill feeling of the witness and his associates toward defendant "Isn't it a fact that you boys have got it in for defendant?" was incompetent, where none of the persons supposed to be hostile was named or described in any manner, and the signification of the slang phrase was not explained to the witness. *pp. 578, 579.*

EVIDENCE.—Exception.—Offer to Prove.—In order to save an exception to the ruling of the court excluding an answer to a question propounded to a witness, a statement must be made to the court of the testimony the witness would give if permitted to answer the question, before a ruling is made on such objection, and an exception reserved to the ruling at the time it is made. *pp. 579, 580.*

INSTRUCTIONS.—Refusal to Give.—Available error cannot be predicated upon the action of the court in refusing to give certain instructions where the substance of each, so far as it stated the law correctly, was fully given in the charge of the court. *pp. 581, 582.*

NEW TRIAL.—Newly Discovered Evidence.—A new trial will not be granted on account of newly discovered evidence, where such evidence is intended only for the purpose of impeachment. *p. 582.*

SAME.—Newly Discovered Evidence.—Where in an application for a continuance on account of the absence of a witness the defendant stated in an affidavit filed in support of the application what he expected to prove by the absent witness, a new trial will not be granted on account of newly discovered evidence of such witness. *p. 583.*

From the Marion Criminal Court. *Affirmed.*

Frank Hendricks, for appellant.

Wm. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

DOWLING, J.—The indictment in this case charged the appellant with an assault and battery with the intent to commit murder in the first degree. The appellant pleaded not guilty, and, upon a trial by a jury, was convicted of the felony set out in the indictment. A motion for a new trial was made and overruled, and judgment was rendered on the verdict.

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The error assigned is the decision of the court overruling the motion for a new trial.

The grounds of the motion argued by counsel for appellant relate to rulings upon objections made by the State, and sustained by the court, to questions asked of witnesses by counsel for appellant; to instructions given and refused; and to that branch of the motion which was founded upon evidence alleged to be newly discovered.

The facts of the case as shown by the proof are, briefly, these: On the night of November 13, 1898, the appellant, who was a youth of about eighteen years, in company with a crowd of other boys and young men, was following a political procession through the streets of Indianapolis. Many of the crowd had light sticks, or thin boards torn from orange boxes, in their hands, and some rough play took place in which they struck each other with these sticks and boards. Appellant was hit on the head with a broom by some one, at which he became angry, and wrongfully accused one Arthur Braxton, a boy of sixteen years, of the act. Braxton denied the charge, and, after some further altercation in which appellant used threatening language toward Braxton, the parties separated. When the crowd had proceeded some three or four squares from the place of the difficulty, Braxton, with several of his companions, sat down near the curbing on Market street, opposite Tomlinson Hall. While they were there, appellant, who had passed beyond them on another street, came back to Braxton, thrust a revolver near his face and fired. Braxton dodged, and the first shot missed him. A second shot struck Braxton in the forehead, and came out near his ear. A third entered his left side, near his breast, and lodged in his back. Appellant attempted to discharge two more barrels of his pistol at Braxton, but his revolver missed fire, and he ran away. Braxton was severely wounded, and, in consequence of his injuries, was confined in a hospital two and one-half weeks. The appellant testified that he had

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been followed by a crowd, of which Braxton was one, and that they had hit him with sticks and stones. To escape from this attack, he said that he had taken refuge in English's Hotel (some four squares from Tomlinson Hall), and had left that building by a rear entrance. He further testified that he came upon Braxton and his associates when opposite Tomlinson Hall, unexpectedly; that Braxton immediately attacked him with a stick; that he believed he was in danger of great bodily harm; and that he shot Braxton in necessary self-defense. The evidence, however, very fully sustained the verdict, and no question is made as to its sufficiency.

The first point presented by counsel for appellant is that the court erred in sustaining the objection of the State to the following question, asked by the appellant on the cross-examination of Charles Smith, a witness for the prosecution: "I will ask you if it is not a fact that you and another boy, whose name I do not now recall, on the 24th day of September, went down and stoned the house where Henry Whitney was staying, at his brother's house?"

The witness had previously been asked whether he was friendly to the appellant, and he had answered that he was a friend of both parties. It is argued that the question was competent for the purpose of showing that the witness was, in fact, hostile to the appellant.

It is undoubtedly true, as stated by the text-writers upon evidence, that where a man's liberty or his life depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know to the greatest extent how far the witness is to be trusted. The hostility of a witness toward a party against whom he is called to testify is always a circumstance affecting his credibility, and may be proved by any competent evidence. It may be shown by the cross-examination of the witness himself, or other witnesses may be called, who can swear to facts from which it may be inferred. It is

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said that it is not a collateral fact regarding which a party is bound by the answer of the witness on cross-examination. If he denies that he entertains any hostility of feeling, other witnesses may be called to contradict him. But where witnesses are so called to discredit another witness, the rule requires that they shall state *his declarations* of unfriendly or hostile feeling, or the *facts* which imply hostility. They cannot be permitted to state their own opinions, or conclusions, on the subject. 1 Greenl. on Ev., §455; *Scott v. State*, 64 Ind. 400, 402; 29 Am. & Eng. Ency. of Law, p. 772, and cases cited in notes.

In *People v. Brooks*, 131 N. Y. 321, 325, 30 N. E. 190, it was held that this "is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and as that may be proved by *any* competent evidence we see no reason for holding that he must first be examined as to his hostility. And such we think is the drift of the decisions in this state and elsewhere."

The supposed *fact*, referred to in the cross-examination of Smith, was that in September he had stoned a house occupied by appellant's brother, and at which appellant was staying. This fact, if established, would not have authorized the inference that the witness was hostile to the appellant. The motive for stoning the house of a relative of appellant might have been enmity toward that relative, which did not extend to the appellant. In the absence of anything connecting the stoning of the house with ill feeling or malice toward the appellant, we think the fact inquired about was immaterial.

Counsel for appellant further contends that the objection should have been overruled, for the reason that it was placed on the ground that the evidence was *incompetent* and *immaterial*, no more specific defect being pointed out. Where an objection to evidence is sustained, if it appears

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that the evidence was inadmissible for any reason, and that the decision excluding it was correct, it makes no difference whether the ground of the objection was sufficient or otherwise. *Maier v. Board, etc.*, 151 Ind. 197.

Had the objection been overruled, the failure to point out more particularly the reasons for excluding the evidence might have deprived the party objecting of the benefit of his exception, unless the evidence on its face appeared to be incompetent. *Heap v. Parrish*, 104 Ind. 36; *McCullough v. Davis*, 108 Ind. 292; *Underwood v. Linton*, 54 Ind. 468; *First Nat. Bank v. Coulter*, 61 Ind. 153; *Farman v. Lauman*, 73 Ind. 568; *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *Lake Erie, etc., R. Co. v. Parker*, 94 Ind. 91; *Kinsman v. State*, 77 Ind. 132.

It is next insisted that the court erred in sustaining the objection of the State to the question asked upon the cross-examination of one Eugene McGinness, a witness for the plaintiff, below: "Isn't it a fact that you boys have got it in for Henry Whitney?" It is claimed that the object of the inquiry was to show the ill feeling of the witness and his associates toward the appellant. The question was objectionable both in form and substance. None of the persons supposed to be hostile was named, or described in any manner. The signification of the slang phrase "have got it in" was not explained to the witness, and the court could not determine how the witness would understand it. The question was not calculated to elicit any declaration of hostility of any of the persons referred to, or any fact from which their state of feeling toward the appellant could be inferred. The same witness was asked: "Isn't it a fact that there is a gang of you that go together, and that you frequently assault people on the street?" The court sustained an objection to the question, and that ruling is complained of. The question was irrelevant to the issue which was being tried by the jury, and it was not proper

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by way of impeachment. Its tendency was to open up a new controversy, without definite limits, the result of which could have no important bearing upon the question of the guilt or innocence of the appellant of the charge in the indictment. The witness could not have been impeached by another witness by proof of particular acts of misconduct, and for the same reason it was not competent to ask him if he had been guilty of divers assaults upon persons on the streets. Sallie Whitney, a witness for appellant, was asked the following question by counsel for appellant: "I will ask you whether or not on the 24th day of September Charles Smith rocked your house at a time when Henry Whitney was there?" For the reasons stated in determining the first point made by appellant, this question must be held incompetent. Another question put by appellant's counsel to Asbury Whitney, also a witness for appellant, was as follows: "I will ask you whether or not about two weeks before this shooting occurred you met Charles Smith on the corner of Court and Liberty streets, and whether he did not at that time have a club in his hand, and he asked you where Henry Whitney was, saying that he had struck him and that he was going to kill him?" An objection was made by the State and the court sustained it. To this decision the appellant excepted, but he made no statement of what he expected to prove by the witness, or what the answer of the witness to the question would be. It is contended on behalf of the State that no question for the consideration of this court has been properly reserved.

The rule in such cases is said to be well established, and it certainly has been plainly stated in many decisions of this court. A question on the ruling of a trial court excluding the testimony of a witness can be presented only where a pertinent question has been propounded, and, upon an objection thereto, before a ruling on such objection, a statement has been made to the court of the testimony the

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witness would give if permitted to answer such question, and an exception reserved at the time to the ruling of the court. An exception to the decision of the court on the objection to the question alone, without a statement of the facts expected to be proved by the answer of the witness, presents no available error. *LaPlante v. State, ex rel.*, 152 Ind. 80; *Rains v. State*, 152 Ind. 69; *Board, etc., v. Arnett*, 116 Ind. 438; *Gipe v. Cummins*, 116 Ind. 511; *Kern v. Bridwell*, 119 Ind. 226; *Deal v. State*, 140 Ind. 354, 371; *Morris v. Morris*, 119 Ind. 341; *Gunder v. Tibbits*, 153 Ind. 591, 607, 608; *Elliott's App. Proc.*, §743; *Lenkenberger v. Meyer* (Ind. Sup.), 56 N. E. 913.

The court gave to the jury the following, among other instructions: "Self-defense may be thus defined: If the defendant from this evidence was without fault in bringing on the shooting on East Market street, and in a place where he had a right to be, and was assaulted by said Arthur Braxton, and from said assault, if any there was, this defendant believed, and had reasonable grounds to believe, he was in great danger of losing his life, or receiving great bodily harm from the said Arthur Braxton, then he would be justified in any defense necessary to protect himself, and in that view of the case he should be acquitted. If you, or either of you, have a reasonable doubt as to whether the defendant acted in self-defense when he fired the shots, he should not be convicted." The objection taken to this instruction is thus stated by counsel for appellant: "The court assumes that appellant did bring on the shooting, and also assumes that there was a shooting, while those are the very questions that the jury ought to decide." The facts that several shots were fired by appellant in the course of his encounter with Braxton, and that no one else did any shooting, were shown without contradiction. The appellant admitted, on his examination, that he did the shooting. The court, therefore, had a right to assume that shooting took place. It did not assume that the appellant brought it on.

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It was brought on by the conduct of one or the other of the parties which preceded the firing of the first shot. The instruction did not intimate which of the parties was the aggressor. Although appellant did the shooting, his conduct may not have brought it on. That he should have been without fault in bringing on the difficulty which resulted in the shooting of Braxton was a necessary qualification of that part of the instruction which stated to the jury the law of self-defense. The rule generally laid down is that he who by his misconduct creates a breach of the peace is chargeable with the consequences thereof.

The objection made to the ninth instruction given by the court is that it omitted the element of premeditation in its definition of the crime of assault and battery with intent to commit murder in the first degree, and therefore did not justify the conclusion of the court that, if the facts stated in the instruction were established beyond a reasonable doubt, the appellant might be found guilty of the felony charged. Although the words "with premeditated malice" were not used by the court, the necessity of such premeditation as a necessary ingredient of the crime charged was clearly stated, so that the jury could not have been misled to the prejudice of the appellant. If the shooting of Braxton took place under the circumstances detailed in the instruction, such shooting was without adequate provocation, and was deliberately done with premeditated malice. In this connection, it may also be observed that the law as to the existence of premeditated malice as an element of the felony charged was properly given in instruction numbered ten.

Another objection made to this instruction is that the evidence did not authorize that part of it which is in these words: "If you, and each of you, are satisfied beyond a reasonable doubt * * * that * * * said defendant left the other parties to hunt for a revolver." The appellant himself testified that he left the crowd and went into Eng-

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lish's Hotel to get his revolver, which he had before that lent to one of the men employed in the kitchen. At least two other witnesses testified that the appellant tried to borrow a revolver at the hotel. In view of this state of the evidence, the court did not go outside of the proof in giving the instruction complained of.

Three special instructions were requested by appellant, but the court refused to give them, and these rulings are assigned as error. We have carefully examined the instructions tendered, and are satisfied that the substance of each, as far as it stated the law correctly, was fully and fairly given in the charge of the court.

The last reason assigned for a new trial was the discovery of new and material evidence after the trial of the cause. The affidavit of the appellant in support of the motion states that since the trial he has discovered that he can prove by one Obed Bean certain conversations which took place between said Bean and Eugene McGinness, and Charles Smith, witnesses introduced by the State, in which declarations were made by McGinness and Smith to Bean contradictory of material testimony given by them on the trial. It is further stated that appellant has discovered since the trial that one Nels Sanders was present when the trouble between appellant and Braxton took place, before appellant went into English's Hotel; that he saw the crowd, of which Braxton was one, hit appellant, and throw rocks at him; that Braxton offered to fight appellant, but the latter said Braxton was too big for him; that after appellant went into the hotel, one of the crowd said: "Let's go down to the market house. He comes past there when he goes home, and we will get him there;" and that the crowd then went to the market house and waited for appellant.

A new trial is never granted upon the ground of newly discovered evidence, where such evidence is intended only for the purposes of impeachment. As the proposed testi-

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mony of Bean was of this character, it need not be further considered. *Humphreys v. State, ex rel.*, 75 Ind. 469; *Wall v. State, ex rel.*, 80 Ind. 146; *Morel v. State*, 89 Ind. 275; *Harper v. State*, 101 Ind. 109; *Meurer v. State*, 129 Ind. 587.

When the case was called for trial, an application for a continuance was made by the appellant, on account of the absence of Nels Sanders, and in the affidavit filed in support of the motion the appellant stated what he expected to prove by Sanders. It appears, therefore, that the appellant knew that Sanders was an important witness for him, and that he was partially informed, at least, as to the facts which could be proved by the absent witness. It is not shown in the affidavit for a new trial why appellant did not learn that Sanders had knowledge of the additional facts disclosed in the application for a new trial, or that any diligence whatever had been used to ascertain what he knew concerning the matters afterwards alleged to have been known by him. In this respect, also, we are of the opinion that the showing made by the appellant for another trial on the ground of newly discovered evidence was not sufficient to meet the requirements of the law in such cases. Besides, the court heard oral testimony on behalf of the State in opposition to the motion, and this evidence conflicted with, and directly contradicted the statements of the appellant in the affidavit filed by him, and the statement of Sanders contained in his affidavit. *DeHart v. Aper*, 107 Ind. 460.

Upon a careful review of the entire record, we are convinced that the verdict was right upon the evidence, that a correct result was reached by the court, and that no reason exists for a reversal of the judgment.

Judgment affirmed.

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CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY
COMPANY v. GLOVER, ADMINISTRATRIX.

[No. 18,741. Filed May 11, 1900.]

MASTER AND SERVANT.—Railroads.—Negligence.—Instruction.—An instruction in an action against a railroad company for the death of an employe caused by the alleged negligence of defendant in maintaining a defective foot-board on its engine which gave way and caused the death of the employe, wholly ignoring decedent's knowledge of the defect, and authorizing a verdict for plaintiff even though the decedent may have had knowledge of the defect or danger, or could have had such knowledge by the exercise of ordinary care, was erroneous. *pp. 585-587.*

INSTRUCTIONS.—Correction.—An erroneous instruction cannot be cured by another instruction which correctly stated the law. *p. 587.*

NEGLIGENCE.—Master and Servant.—Burden of Proof.—In an action against a railroad company for the death of an employe caused by the alleged negligence of defendant in maintaining a defective foot-board on its engine which gave way and caused the death of the employe, the burden of proving the decedent's want of knowledge of the defect, actual and constructive, was upon plaintiff, and not upon defendant. *pp. 587, 588.*

From the Greene Circuit Court. *Reversed.*

E. C. Field, W. S. Kinnan and Davis & Moffett, for appellant.

T. J. Brooks, S. B. Lowe and W. T. Brooks, for appellee.

MONKS, J.—This action was brought by appellee against appellant to recover damages for the death of William D. Glover. The decedent was employed by appellant as a conductor of a stone train. His duties were to supply various stone quarries with empty cars to be loaded with stone, and to haul out loaded cars to the main track. At 6 o'clock a. m. on December 15, 1897, the decedent and his train crew left Bedford for their usual day's work. A few minutes after 9 o'clock they coupled engine number twenty-eight to some cars, and pushed them into the Hallowell quarry.

154	584
181	683
154	584
164	151
164	196

154	584
166	672

154	584
169	153

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The decedent, his two brakemen, and a boy stepped onto the foot-board at the rear end of the engine tank, and the engine was started, running backwards out of the quarry. At a point on the switch about 300 feet from where the cars were left there was an embankment of dirt, stone and spalls, from three to five feet high, and thirty feet long; this embankment sloped downwards from the top to the end of the ties, at an angle of about forty-five degrees. At a point about the center of this embankment the end of the foot-board on which the decedent was standing struck a rock, or spall, splitting and breaking it; the decedent either jumped or fell against this embankment, and was so close to the track as to leave no room to escape, and he was run over by the engine, and killed. The jury returned a general verdict in favor of appellee, and also answers to special interrogatories. Appellant filed a motion for a new trial, which was overruled, and judgment rendered on the verdict against appellant.

One of the causes assigned for a new trial calls in question the correctness of instruction twelve given to the jury. The instruction reads as follows: "Or if you find from the evidence, by a preponderance thereof, that said engine twenty-eight had a foot-board which was negligently constructed by the defendant out of brash, brittle, and unsound timber, and insecurely placed, and that said Glover was using the said engine number twenty-eight at the time of his injury, in the line of his duty, and was on the said Hollowell switch, and that said engine was in motion, and that he was riding on said foot-board, giving due and reasonable attention to the duties of the occasion, and that at that time defendant company had permitted stone, rock, and debris of various kinds to be placed along said track, on either side thereof, for some distance on either side of the point where the accident is charged to have occurred, which stone, rock, and debris were placed within a foot of the rail of said track, and that said rock, stone, and debris

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formed an embankment of a height of from four to five feet, rising at an angle of forty-five degrees, or thereabouts, and that the defendant company knew such debris, rock, and stone and embankment were there, and that while the said Glover was so in discharge of the line of his duty and was riding on said foot-board, the same collided with a stone, and that by reason of said foot-board being negligently constructed of brash, brittle, and unsound timber it broke and gave way when it collided with said stone, and that by reason of said breakage, and giving away of said board, the decedent was thrown, or caused to fall, over against said embankment, and that said embankment kept him from extricating himself from danger as he might have done had it not have been for said embankment, when he fell against it, causing him to rebound and fall under said engine, and that said engine passed over him, causing him such injury as resulted in his death, and that he was without fault therein, then you should find for the plaintiff."

It was alleged in the complaint that appellant had full knowledge of the defects mentioned in said instruction, and that the decedent had no knowledge thereof. Under the allegations of the complaint appellee was required to prove not only that the decedent had no knowledge of said defects, but that he could not have known them by the exercise of ordinary care. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 299, 300, and cases cited; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 535.

It will be observed that said instruction wholly ignores the decedent's knowledge of the defects mentioned in said instruction, and directs a verdict in favor of appellee, even though the decedent may have had full knowledge of said defects or dangers, or could have had such knowledge by the exercise of ordinary care. If he had knowledge of said defects and dangers, or could have had such knowledge by the exercise of ordinary care, then he assumed the risks resulting therefrom, if thereafter he voluntarily continued

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in the service. *Consolidated Stone Co. v. Summit*, *supra*, *Pennsylvania Co. v. Ebaugh*, *supra*, and cases cited; *Cleveland, etc., R. Co. v. Parker*, *ante*, 153; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561, 565, and cases cited; *Jenny Electric Light, etc., Co. v. Murphy*, 115 Ind. 566, 569, 570. See also *McFarlan Carriage Co. v. Potter*, 153 Ind. 107; *Quinn v. Chicago, etc., R. Co.*, 107 Iowa 710, 77 N. W. 464; 12 Am. & Eng. R. Cas. N. S. 512.

In *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, the trial court gave the jury an instruction which contained the element of actual knowledge on the part of the injured employe, but omitted any reference to his constructive knowledge, and this court said: "The objection urged against instruction nineteen is that it limited the plaintiff's assumption of risk to the defects in the road-bed of which he had actual knowledge. It is a rule of universal acceptance by the courts of this country that an employe assumes all the ordinary dangers of his employment, which are known to him, or which by the exercise of ordinary diligence would have been known to him."

As the said instruction twelve directed the jury in plain terms to find for the plaintiff if the facts therein stated were proved, without regard to the actual or constructive knowledge of decedent, it was clearly erroneous. Such an instruction could not be corrected by another which correctly stated the law; this could only be done by withdrawing the instruction from the jury, which was not done. *Pittsburgh, etc., R. Co. v. Noftsgier*, 148 Ind. 101, 109, and cases cited; *Wenning v. Teeple*, 144 Ind. 189, 194, and cases cited; *Clem v. State*, 31 Ind. 480.

Appellee insists that said instruction was harmless for the reason that the evidence and the answers of the jury to the special interrogatories show that the decedent had no actual or constructive knowledge of said defects. The jury answered interrogatories concerning the decedent's knowledge of the track, the condition of the banks, stones, and

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spalls, and the proximity of the same to the track, but answered no interrogatories "concerning the decedent's knowledge, actual or constructive, of said foot-board being constructed of brash, brittle, and unsound timber and being insecurely placed." The burden of proving the decedent's want of knowledge, actual and constructive, was upon appellee, and not upon appellant. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 299, 300, and cases cited; *Cleveland, etc., R. Co. v. Parker, ante*, 153; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 535; *Ames, Adm., v. Lake Shore, etc., R. Co.*, 135 Ind. 363.

We have read the evidence, and it is of such a character as required the court to submit to the jury the question whether or not the decedent had knowledge, actual or constructive, of the "brash, brittle, and unsound condition of said foot-board and its being insecurely placed." In such a case it cannot be said that said instruction was harmless. It follows that the trial court erred in overruling appellant's motion for a new trial. It is not necessary, therefore, to determine whether or not the answers to the interrogatories show that the decedent had no knowledge, actual or constructive, of the other defects mentioned in said instruction.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

FORSYTHE ET AL. v. BRANDENBURG.

[No. 18,766. Filed May 17, 1900.]

VENDOR AND PURCHASER.—Vendors' Liens.—Husband and Wife.—Principal and Agent.—The purchaser of real estate at an executor's sale procured the receipt of plaintiff, an heir and beneficiary, for the amount of her interest in the estate, under the agreement that he would pay the amount thereof to her with interest, or would deed her part of the real estate in payment thereof, which receipt the executor accepted in lieu of that amount of the purchase money. The purchaser sold the land to F. whose husband as her

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agent had actual notice of plaintiff's claim before the deed was made and before any part of the purchase money was paid. *Held*, that the agreement giving the original purchaser the option of paying the purchase money in land did not prevent the enforcement of plaintiff's lien, and that the land was subject to said lien in the hands of the last purchaser.

From the Huntington Circuit Court. *Affirmed*.

James M. Hatfield, for appellants.

Thomas G. Smith, for appellee.

MONKS, J.—Action by appellee against appellants to enforce a lien against real estate.

Appellants' demurrer to the complaint for want of facts was overruled. Appellants filed separate answers to the complaint. Appellee filed replies to said answers. The demurrers of appellant, Harriet Forsythe, to two paragraphs of appellee's reply to said appellant's answer were overruled. The cause was tried by the court, and a special finding of facts made, and conclusions of law thereon stated in favor of appellee, and, over a motion for a new trial, judgment was rendered against appellants, and the real estate ordered sold to pay the same.

The errors assigned call in question the first conclusion of law, the action of the court in overruling the demurrer to the complaint, in overruling the demurrers of appellant, Harriet Forsythe, to said paragraphs of the reply, and in overruling the motion for a new trial.

If the first conclusion of law was not erroneous, the court properly overruled the demurrer to the complaint, and the errors, if any, in overruling the demurrers to the paragraphs of reply were harmless.

It appears from the finding of facts that Moses Brandenburg, who was the father of appellee, Samuel E. Brandenburg, one of the appellants, and six other children, died testate, seized in fee simple of the real estate described in appellee's complaint. Said Moses Brandenburg by his last will, which was duly admitted to probate, gave a

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legacy of \$500 to appellee, and devised the real estate in controversy to his eight children. His executor, by order of court, sold said real estate for the payment of the debts of said deceased to one of the appellants, Samuel E Brandenburg, and by order of court executed to him a deed therefor. There was due of the proceeds of the sale of said real estate, after the payment of debts, and deducting the legacy of \$500 given to appellee, the sum of \$260 to each of said eight children. And there was due to appellee out of said proceeds said legacy of \$500, making a total amount due her of \$760. It was agreed between the executor, Samuel E. Brandenburg, one of the appellants, who was the purchaser of said real estate, and appellee, that if said Samuel would procure the receipts of appellee for said sum of \$760, said executor would accept them in lieu of that amount of the purchase money for said real estate, and it was agreed that said Samuel would pay the same to appellee, with six per cent. interest, or would deed her a part of said real estate in payment thereof. Said appellee, pursuant to said agreement signed said receipts, and delivered them to said Samuel, who delivered the same to the executor, who accepted the same in lieu of that much purchase money. Said executor filed said receipts of said appellee for said \$760, and received credit therefor in the settlement of said estate. Afterwards a written contract was executed by the appellee and said Samuel, which provided that said appellee "agreed" to let her share lay until the place is paid for, after which said Samuel agrees to pay her \$760 with six per cent. interest, or deed her a part of the land for the amount." Several years after the date of said agreement said Samuel E. Brandenburg agreed to adjust said claim, and otherwise secure appellee, by executing two notes with one Marvin Brandenburg as security, one for \$550, and one for \$210, both to be secured by a mortgage upon another tract of land owned by said Samuel E. adjoining the tract described in the complaint; said notes were executed by said

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Samuel E. and said Marvin, but said mortgage was never executed, and said notes never accepted by appellee. Said Samuel E. and Marvin Brandenburg were when they executed said notes, and ever since have been, and now are, insolvent, and said notes are worthless. Said appellee lived in two rooms in the dwelling-house on the real estate described in the complaint, furnished with her furniture, since a short time after her father's death, and still occupies the same as her home. Said Samuel has never conveyed appellee any part of said land, or otherwise paid any part of said indebtedness, except that in a settlement between them said Samuel E. was allowed by appellee \$128 for her meals at his table, to be applied on the interest of said indebtedness. The total amount of said indebtedness of \$760 and the interest thereon, less said \$128, is due from said appellant Brandenburg. On February 5, 1898, appellant, Joseph Forsythe, for and on behalf of his wife and co-appellant, Harriet Forsythe, began to negotiate with said Samuel E. Brandenburg for the purchase of said land, and on February 7, 1898, at 7 o'clock in the evening, said Brandenburg executed a deed for said land to appellant, Harriet Forsythe, and after its execution she paid him \$150 on said land, and assumed the payment of the Richards and Vergon mortgages. About noon on said day said Brandenburg and his co-appellants, Forsythe and Forsythe, arranged for an extension of time on a mortgage of the Aetna Life Insurance Company on said land, and paid the accrued interest thereon, and \$45 commission, for such extension, and gave notes for the annual interest in advance, as a part consideration for the conveyance that was made in the evening of said day. Joseph Forsythe was the agent of his wife and co-appellant, Harriet Forsythe, in the negotiation for and purchase of said real estate, and while he was negotiating for the purchase of the same for his wife, and before anything was paid on said real estate, he was notified at two different times that appellee

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held a claim against said Brandenburg and said land, and that she would not yield her possession of the dwelling-house thereon until she was paid; that at five o'clock and twenty minutes on February 7, 1898, and before the deed was executed and said \$150 of purchase money paid, and before the assumption of the payment and settlement of the Richards and Vergon claims, appellee had filed her complaint in this case, and caused summons to issue thereon, and had also filed her *lis pendens* notice in said case, by which notice was given to all persons concerned that appellee had commenced suit in the Huntington Circuit Court, the object and purpose of which was to enforce a purchase money lien against said real estate for \$1,000, which real estate was described in said notice.

Upon the facts found the court stated as a conclusion of law that appellee is entitled to recover the sum of \$906.95, and that said sum is a lien on the land described in the complaint as against all the defendants in said cause, and that it is a paramount lien and claim to that of the appellant Harriet Forsythe by virtue of her deed or otherwise. The court did not err in this conclusion of law.

The substance of the transaction between the executor, Samuel E. Brandenburg, and appellee was that appellee signed and delivered receipts for her legacy of \$500 and \$260, her share as devisee of the proceeds of the sale of said real estate, in all \$760, and thereby released and satisfied her claim for said sum against said executor and the estate, in consideration of which said Brandenburg, the purchaser of said real estate, promised to pay her \$760 of the purchase money for said land. When said transaction was completed said Brandenburg was indebted to appellee for said \$760 of the purchase money, instead of the executor, and the executor and the estate had thereby paid appellee her legacy of \$500, and her share of the proceeds of said land as devisee, amounting to \$260. There was a lien on said real estate for said purchase money, and the same vested in her with

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the promise by the purchaser to pay her said \$760 of said purchase money. It is settled in this State that, under such circumstances, appellee was entitled to enforce a lien against said real estate for the amount of said purchase money remaining unpaid. *Upland Land Co., v. Ginn*, 144 Ind. 434, 438, and cases cited; *Otis v. Gregory*, 111 Ind. 504; *Barrett v. Lewis*, 106 Ind. 120; *Dwenger v. Branigan*, 95 Ind. 221; *Boyd v. Jackson*, 82 Ind. 525; *Nichols v. Glover*, 41 Ind. 24.

It was said in *Otis v. Gregory*, *supra*, p. 513: "Equity has regard in such cases, as in others, for the substance, and not for the mere form. If, upon looking through the transaction, it appears that the debt which the party owes is in fact part of the purchase price of land, acquired in the transaction out of which the debt arose, a lien will be declared upon the land in favor of the person to whom such debt is due."

Mrs. Forsythe was not an innocent purchaser, for the reason that her husband, who was acting as her agent in making said negotiations and purchasing said land, received notice of appellee's claim before the deed was made, and before any part of the purchase money was paid. The real estate was therefore subject to said lien in her hands. *Hawes v. Chaille*, 129 Ind. 435, 436; *Strohm v. Good*, 113 Ind. 93; *Higgins v. Kendall*, 73 Ind. 522.

The fact that the purchaser, under the agreement with appellee, had the option of paying said purchase money by conveying a part of said real estate instead of paying the same in money, does not prevent the enforcement of the lien, neither did the agreement on the part of appellee to receive said real estate in payment of said indebtedness waive said lien. *Warvelle on Vendors*, 707; 28 Am. & Eng. Ency. of Law, 165, 166; *Harvey v. Kelly*, 41 Miss. 490, 93 Am. Dec. 267; *Deason v. Taylor*, 53 Miss. 697, 700; *Winters v. Fain*, 47 Ark. 493, 1 S. W. 711; *Plowman v. Riddle*, 14 Ala. 169, 48 Am. Dec. 92.

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Whether or not, under the facts found, the *lis pendens* filed was constructive notice to appellant, Harriet Forsythe, is immaterial, for the reason that the finding shows that her husband, who was her agent in making said purchase and in negotiating therefor, had actual notice of appellee's claim before said purchase, while acting as her agent in conducting said negotiations. This was notice to said appellant, Harriet Forsythe. *Brannon v. May*, 42 Ind. 92, 101, and authorities cited; 1 Am. & Eng. Ency. of Law (2nd ed.), 1145.

The evidence, though conflicting on some points, is sufficient to sustain all findings necessary to uphold said conclusion of law.

Judgment affirmed.

• *ABICHT v. SEARLS ET AL.*

[No. 18,826. Filed May 17, 1900.]

MORTGAGES.—Husband and Wife.—Tenants by Entireties.—A mortgage executed by a husband and wife on lands formerly held by them as tenants by entireties, but which had been conveyed to a third person without consideration, and reconveyed to the husband, to secure the individual debt of the husband, is voidable, not only as to the wife, but as to the husband as well. *pp. 595-597.*

SAME.—Husband and Wife.—Tenants by Entireties.—Estoppel.—Where a wife joined her husband in conveying to a third person real estate held by them as tenants by entireties, and also joined in the execution of a mortgage thereon after the land had been reconveyed to the husband, to secure his individual debt, she is not thereby estopped from contesting the validity of the mortgage on the ground that the title to the property was held by them as tenants by entireties, no misrepresentation or concealment having been shown on her part. *pp. 597, 598.*

From the Delaware Circuit Court. *Affirmed.*

S. A. Dickson, J. D. Clark and Templer, Ball & Templer, for appellant.

R. S. Gregory, A. C. Silverburg and O. J. Lotz, for appellees.

154	594
155	25
154	594
155	630

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BAKER, J.—Suit by appellant to foreclose a mortgage. Answer in general denial by all the appellees, and answer of coverture and suretyship by appellee Mary E. Searls. Reply in general denial and two affirmative paragraphs of estoppel. Trial by the court. Special finding of facts and conclusions of law. Personal judgment for appellant against appellee Ezra Searls and judgment for appellees denying the foreclosure. Motion for a new trial overruled. Exceptions by appellant to each adverse ruling. The only question presented on this appeal is the correctness of the conclusions of law on the facts found.

The finding is substantially as follows: On February 17, 1886, John Kirk conveyed the real estate in controversy, a lot in Muncie, Indiana, to appellees Ezra Searls and Mary E. Searls, husband and wife, who took and held the title as tenants by entireties, until September 2, 1886. Some days prior to September 2, 1886, Ezra Searls applied to John A. Keener, a loan agent and money broker, residing in Muncie, to obtain a loan of \$600 for use in his business as carpenter and contractor, and offered to give as security for the repayment of the loan a mortgage on the property owned by himself and wife; Keener was acquainted with the condition of the title and informed Searls that a mortgage could not be given while the title was held by himself and wife, and advised him to have conveyances made of the property by which the title might be in himself and if the title was so transferred he would procure him the loan. Shortly after this conversation Keener wrote to appellant, who lived in Dayton, Ohio, and informed him that he could loan for him \$600, to be secured by first mortgage upon a Washington street property owned by Ezra Searls. Shortly after the receipt of the letter, appellant forwarded to Keener \$600. On September 2, 1886, Keener prepared deeds from Ezra Searls and wife, Mary E. Searls, to Calvin Wachtell, and from Wachtell and wife to Ezra Searls, also a mortgage for \$600 from

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Searls and Searls to appellant, being the mortgage in controversy, and the deeds and mortgage were executed by the parties at the same time as a part of the same transaction. The consideration of the deeds purported to be \$2,500, but in fact there was no consideration, and they were executed solely for the purpose of placing the title in Ezra Searls. As a part of the same transaction Ezra Searls executed to appellant a note for \$600 and five interest coupon notes for \$48 each, and to secure these notes he delivered to Keener the mortgage above mentioned. After the execution and delivery of the deeds, notes, and mortgage, Keener delivered to Ezra Searls the \$600, and Ezra used and expended it in his own separate business, and no part was paid to or received by Mary E. Searls or applied to any debt or liability of hers, nor was any part used in the payment of any encumbrance on, or to improve or better the condition of the lot. Keener mailed the notes to appellant, and after the deeds and mortgage were recorded he prepared an abstract of title to the property and sent the mortgage and abstract to appellant at Dayton, Ohio. When the first coupon interest note became due, appellant sent it to Keener, who collected it and forwarded the money to appellant. There was due on the notes as principal, interest, and attorney's fees \$1,187.35. Upon these facts the court concluded the law to be that appellant was entitled to a personal judgment against Ezra Searls for \$1,187.35, and that he was not entitled to a foreclosure of his mortgage.

Had the mortgage been made directly to appellant without the conveyances mentioned in the special findings, there could have been no question of its invalidity as to both Ezra and Mary E. Searls, as it is settled law that a mortgage executed by husband and wife upon real estate owned by them as tenants by entireties, to secure the individual indebtedness of the husband, is voidable, not only as to the wife, but as to the husband as well. *Bennett v. Mattingly*,

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110 Ind. 197; *Crooks v. Kennett*, 111 Ind. 347, 349; *McCormick, etc., Co. v. Scovell*, 111 Ind. 551; *Wilson v. Logue*, 131 Ind. 191; *Sohn & Co. v. Gantner*, 134 Ind. 31; *Klein v. Gantner*, 135 Ind. 699; *Grzesk v. Hibberd*, 149 Ind. 354. This being true, the conveyance of the property to Wachtell and the reconveyance to Ezra Searls (being without consideration and for the sole purpose of placing the title in Ezra Searls) would not change the result, for the law declares that whatever is prohibited to be done directly cannot be effected indirectly. *McCormick, etc., Co. v. Scovell, supra*; *Long v. Crosson*, 119 Ind. 3, 4 L. R. A. 783; *Grzesk v. Hibberd*, 149 Ind. 354.

It is the insistence of appellant, however, that on the facts, as found, Mary E. Searls is estopped from claiming that the title to the property was held by entireties. Such a conclusion is unauthorized by the special findings. The burden was on appellant to establish the facts constituting an estoppel, and to authorize a conclusion of law that a party is estopped, every essential element must be clearly stated in the special findings. It must affirmatively appear from the findings, *first*, that there was a misrepresentation or concealment of material facts; *second*, that the misrepresentation was made with knowledge of the facts; *third*, that the party to whom it was made was ignorant of the truth of the matter; *fourth*, that it was made with the intention that the other party should act upon it; *fifth*, that the other party was induced to act upon it, to his injury. *First Nat. Bank v. Williams*, 126 Ind. 423; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725. Keener was a loan broker, an intermediary, who brought borrower and lender together. His business was to find lenders for borrowers, and borrowers for lenders. In so far as he acted for a borrower, he was the borrower's agent. In so far as he acted for the lender, he was the lender's agent. *Haas v. Ruston*, 14 Ind. App. 8. Ezra Searls was the borrower, and appellant was the lender. The arrange-

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ment between Keener and Ezra as to the proposed transfer of title was made, and the letter from Keener to appellant was sent, before Mary E. Searls is shown to have had any knowledge of the transaction. The only thing that the finding shows that she did was to sign the deed and mortgage on September 2, 1886. Appellant had sent Keener the money to loan before that time. Keener, in his letter, did not disclose that he was acting for the borrower, Ezra; so, as far as appellant is concerned, he relied on Keener in making the loan, and Keener's knowledge was appellant's, if it were material that appellant's knowledge be shown. But the subject of appellant's knowledge would not be material until appellant had first established a misrepresentation or concealment of material facts on the part of Mary. And that, the finding fails to show.

Judgment affirmed.

TURNER, RECEIVER, v. ILLINOIS STEEL COMPANY.

[No. 18,834. Filed May 18, 1900.]

EVIDENCE.—*Weight.*—Where in an action on a note the defendant pleaded a set-off on account of rents claimed to be due under a lease, and the lease failed to show on its face any obligation against plaintiff, the action of the court in excluding the lease will not be disturbed on appeal, there being some evidence to support the finding that plaintiff was not the lessee.

From the Lake Circuit Court. *Affirmed.*

A. F. Knotts, for appellant.

W. D. Haynie and J. Kopelke, for appellee.

BAKER, J.—In August, 1893, the East Chicago Iron and Steel Company executed notes, secured by mortgage of its plant at East Chicago, Indiana, which by indorsement became the property of appellee. In July, 1896, Turner was appointed receiver of the East Chicago Company. Appellee filed an intervening petition to enforce its claim upon the notes and mortgage. The receiver pleaded a set-

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off on account of rents claimed to be due him from appellee under a lease of the East Chicago plant alleged to have been executed by the receiver as lessor to appellee as lessee. The court found for appellee on its claim, and against the receiver on his set-off.

The only question presented is the admissibility of a written lease offered in evidence by the receiver. In this lease, the receiver was lessor, and one "William H. McLean, as trustee," was lessee. The lease on its face is no evidence of an obligation against appellee. The receiver introduced parol evidence for the purpose of identifying appellee as the undisclosed principal; and, among other witnesses, examined McLean. The evidence is conflicting, but there is evidence, which manifestly was acted upon by the court, to justify the finding that appellee was not the lessee. Since that was the ultimate issue of fact to be determined by the court, as the trier, there is no available error in the action of the court in excluding the lease.

Judgment affirmed.

THE STATE, *EX REL.* BRUNS, v. CLAUSMEIER ET AL.

[No. 18,484. Filed May 29, 1900.]

SHERIFF.—Prisoner.—Taking Photograph.—Damages.—A sheriff may take the photograph of a prisoner, ascertain his height, weight, name, residence, place of birth, occupation, and the color of his eyes, hair, and beard, if he deem it necessary to secure his safe keeping, or to recapture him more readily should he escape, without becoming liable in damages therefor, where no force or violence is used. *pp. 600-603.*

SAME.—Circulating Photograph and Description of Prisoner.—Liability on Official Bond.—A sheriff in sending out photographs and descriptions of a prisoner in his custody to police departments and individuals is not acting in an official capacity and is not liable on his official bond therefor. *pp. 603, 604.*

From the Allen Circuit Court. *Affirmed.*

W. M. Ninde, B. F. Ninde and C. Holder, for appellant.
Morris, Barrett and Morris, for appellees.

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MONKS, J.—This action was brought by the relator against appellee, Clausmeier, on his official bond as sheriff, and the other appellees, sureties on said bond, to recover damages for an alleged breach thereof. A demurrer for want of facts was sustained to the complaint, and, the relator refusing to plead further, judgment was rendered in favor of appellees.

It is alleged in the complaint that while the relator was confined in the jail of Allen county, and in the custody of said Clausmeier as sheriff, on a charge of forgery, said Clausmeier, on the 13th day of November, 1896, "without the consent, and against the wish of said relator, compelled him, by force of commands, and threatening physical compulsion, to come forth out of his cell in said jail into the office of said jail, and then and there, intentionally, wrongfully, unlawfully, and maliciously took the picture of said relator, and on the same day, without the consent and against the wish and notwithstanding the protest of relator; said Clausmeier weighed and measured said relator, and by observation of the body of said relator, and by inquiry of him, and by means of records, obtained a personal description of relator;" that on said 13th day of November, 1896, and thereafter, said Clausmeier "maliciously intending to ruin the relator's fair name and reputation, and to bring said relator into public infamy, disgrace, and scandal, by holding said relator up to scorn, ridicule, contempt, and execration, and to impair his enjoyment of general society by imputing and implying that said relator had committed a crime and was a rogue and a criminal, by associating the picture of the relator with the pictures of criminals, and representing the said relator as a criminal and as a person whom the police should watch, and whom the officers of the law generally should observe and watch more critically than said officers and said police do mankind generally who are not known as criminals, by placing the picture of said relator on cards which are used for mounting the pictures of

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criminals, and using said pictures for the express and sole purpose of holding said relator forth as a criminal, on said day did maliciously and falsely make and publish of and concerning the relator the following false, scandalous, malicious, and defamatory words, and picture of said relator in connection therewith [The description of the relator, and the charge against him, and by whom he was arrested, as shown on the back of said picture, are set forth in the complaint]; that the pictures of persons taken and mounted as aforesaid on cards of that style, with the words and combination of words printed and written thereon, as a whole, when exhibited and used as these were, have a definite and well known meaning that said persons are criminals and rogues, and that said pictures and words make what are well and popularly known as the Rogues Gallery; that said Clausmeier, before the relator had any opportunity to prove his innocence of the charge for which he was committed, wrongfully, unlawfully, and maliciously caused large numbers of the picture of said relator, and said words and combination of words on the reverse side thereof, to be sent and placed in the police department of the city of Ft. Wayne, and to divers persons to the relator unknown, and has widely published the libel here complained of; that said relator was innocent of said charge, and was afterwards honorably acquitted of the said charge placed against him. Whereby and by means of which acts aforesaid said relator has been greatly prejudiced in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered in his good name, fame, and reputation, and has suffered damage thereby," etc.

It is the duty of a sheriff to confine in jail and safely keep all persons in his custody awaiting trial on a charge of crime until lawfully discharged, and, if they escape, to pursue and recapture them. A sheriff in making an arrest for a felony on a warrant has the right to exercise a discretion, not only as to the means taken to apprehend the

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person named in the warrant, but also as to the means necessary to keep him safe and secure after such apprehension until lawfully discharged; and he has the right to take such steps and adopt such measure as in his discretion may appear to be necessary to the identification and recapture of persons in his custody if they should escape. Unless this discretion is abused through malice, wantonness, or a reckless disregard for and a selfish indifference to the common dictates of humanity, the officer is not liable. *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885, 15 Am. St. 266; *Diers v. Mallon*, 46 Neb. 121, 64 N. W. 722, 50 Am. St. 598. It is the duty of the said officer to search the person and take from him all money or other articles that may be used as evidence against him at the trial. *Rusher v. State*, 94 Ga. 363, 21 S. E. 593, 47 Am. St. 175, and note p. 180. And he may take from him any dangerous weapons, or anything else that said officer may, in his discretion, deem necessary to his own or the public safety, or for the safe-keeping of the prisoner, and to prevent his escape; and such property, whether goods or money, he holds subject to the order of the court. *Closson v. Morrison*, 47 N. H. 482, 93 Am. Dec. 459; *Commercial, etc., Bank v. McLeod*, 65 Iowa 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; *Reifsnyder v. Lee*, 44 Iowa 101, 24 Am. Rep. 733; *Holker v. Hennessey*, 141 Mo. 527, 540, 42 S. W. 1090, 64 Am. St. 524, 532, and note p. 537, 39 L. R. A. 165; Gillett's Crim. Law (2nd ed.), §158.

In *Closson v. Morrison*, *supra*, and *Holker v. Hennessey*, *supra*, it was held that said officer might not only take any deadly weapon he might find on the person, but also money or other articles of value found upon the person, though not connected with the crime for which he was arrested and could not be used as evidence on the trial thereof, by means of which, if left in his possession, he might procure his escape, or obtain tools, implements, or weapons with which to effect his escape.

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It would seem, therefore, if, in the discretion of the sheriff he should deem it necessary to the safe-keeping of a prisoner, and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation, color of his eyes, hair, and beard, as was done in this case, he could lawfully do so. The complaint does not charge that any physical force was used to induce the relator to have his negative taken, or to furnish the sheriff the information above mentioned not obtainable by observation.

It is evident that the substantial cause of action set forth in the complaint is an alleged libel of the relator by the appellee, Clausmeier, in the publication of said pictures and the writing on the backs thereof, by sending the same to the police department of Ft. Wayne, and to the divers persons to the relator unknown. Conceding, without deciding, that if a sheriff commits an assault and battery upon a person in his custody, or fails to use ordinary care to protect him against acts of violence from others, he and his sureties are liable on his official bond to such person therefor, yet it does not follow that a sheriff and his sureties are liable on his official bond for libelous words published by said sheriff of and concerning a person in his custody. If a sheriff have a person in his custody on a charge of crime, and orally, or in writing, uses language concerning said person which is slanderous or libelous *per se*, while he may be liable to an action therefor, there is no liability on his official bond on account thereof. A person who is a sheriff in speaking or writing such language, under such circumstances, is not guilty of any misfeasance, malfeasance, or nonfeasance as such officer. He is neither performing an official duty in a proper or improper manner, nor doing any act whatever as an officer.

It is evident that said Clausmeier, in sending said photographs with the writing on the backs thereof, was not acting

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either *virtute officii* or *colore officii*. Under such circumstances, there is no liability on an official bond. *State, ex rel., v. Givan*, 45 Ind. 267; *State, ex rel., v. Kent*, 53 Ind. 112. It is unnecessary, therefore, to determine whether or not the photographs and the words thereon were libelous when considered in connection with the other allegations of the complaint. Judgment affirmed.

ROWE v. HAMBERGER ET AL.

[No. 18,778. Filed May 29, 1900.]

INJUNCTION.—*Deeds.—Warranty.—Indemnity Mortgage.*—A mortgage executed by a grantor of real estate to secure grantee from loss by reason of an alleged outstanding paramount title to part of the real estate conveyed, runs with the land, and a purchaser of the land from the holder of the mortgage, under covenants of warranty, may restrain his grantor from releasing the mortgage.

From the Jay Circuit Court. *Affirmed.*

W. H. Williamson and *E. E. McGriff*, for appellant.
J. F. LaFollette and *J. W. Thompson*, for appellees.

BAKER, C. J.—Injunction. The material facts in appellees' complaint are these: One Isenhart was the owner of 160 acres of land in Jay county. In May, 1894, he conveyed forty acres thereof to his daughter Nancy Lee. Some time afterwards he took the unrecorded deed from Mrs. Lee and destroyed it. On January 11, 1897, Isenhart conveyed and warranted the whole tract to appellant, who duly recorded his deed. In the deed, appellant assumed encumbrances to the amount of \$1,600. Appellant knew that Mrs. Lee claimed title to forty acres, so he required Isenhart to give him a mortgage on certain lots in the city of Portland, conditioned upon Isenhart's perfecting the title and saving appellant harmless from Mrs. Lee's claim. This mortgage was given January 11, 1897, and was duly recorded. On February 9, 1897, appellant executed to appel-

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lees his warranty mortgage of the 160 acres and other lands to secure the payment of \$10,990. Appellees took the mortgage in the full belief that appellant's title was perfect. In September, 1897, Mrs. Lee began suit against appellant and appellees to quiet her title to the forty acres. Appellant is wholly insolvent, and, as appellees are informed and believe, is about to satisfy and release the Isenhart indemnity mortgage. Unless appellant is restrained, appellees will lose their security and will suffer irreparable loss. Notice of application for a temporary order cannot safely be given, because appellant would transfer or release the indemnity mortgage before a hearing could be had. Prayer for a temporary restraining order and, on final hearing, an injunction against appellant's assigning or releasing the indemnity mortgage until the Lee case is ended and the rights of the parties fully determined. Appellant's demurrer to this complaint for want of facts was overruled and, on his refusal to plead further, judgment was rendered.

Is the indemnity personal to appellant, or does it so run with the land as that appellees have a preservable interest therein? Isenhart warranted the title to appellant. Appellant warranted the title to appellees. If appellees should suffer loss by reason of an outstanding paramount title, they could proceed against Isenhart on his covenant, because it was a real covenant. Isenhart's indemnifying mortgage was collateral to the covenant in his deed to appellant, and though appellant was the only indemnitee named, the security followed the real covenant, as the incident, the shadow, always follows the principal, the substance. In *Smith v. Peace*, 1 Lea 586, it appeared that at a chancery sale of the lands of W. H. Peace, deceased, T. C. Peace, one of the heirs, became purchaser and left unpaid part of the purchase money, the amount depending upon an accounting among the heirs thereafter to be had, for which a lien was retained. He sold the land to Burwell by title bond, and took Burwell's notes for the purchase money.

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Some months afterwards, Burwell filed a bill charging that T. C. Peace had become insolvent and was unable to make good title, and praying that T. C. Peace be enjoined from collecting or transferring his notes until the encumbrance should be removed. To get rid of this suit, Peace executed to Burwell a bond, with Golliday and Tarver as sureties, binding him to make Burwell a title clear from encumbrance when by proper account the sum due the Peace heirs could be ascertained, and to save Burwell from loss. Burwell dismissed his bill, paid his notes, and afterwards sold the land by title bond to Smith and Goldston, receiving payment in full. The land was afterwards held liable for a balance of unpaid purchase money due from T. C. Peace to the Peace heirs, and Smith and Goldston paid the amount. On their action upon the bond, the sureties Golliday and Tarver contended that the bond "was a mere personal covenant between said parties and Burwell, to whom it was executed, and its benefits did not pass with the land when sold by Burwell to the complainants Smith and Goldston. Nor has the bond been assigned to complainants, either directly or by operation of law, and they therefore can not sue upon it in any court. Furthermore, this bond did not bind the sureties absolutely to remove the prior incumbrance upon the land, but only to indemnify Burwell against loss, and as he has suffered no loss there is no liability." The court said: "The complainants, having bought the land from Burwell and paid him in full and received his bond, have the right to call upon him for a valid and unincumbered title, and for the enforcement of all the obligations which he holds upon others by means of which an unincumbered title is to be obtained."

As no loss has yet been sustained on account of the claim of Mrs. Lee, no action could be maintained at present by anyone upon the indemnity mortgage; but, since appellees would be entitled to the benefit of the indemnity in case of loss, appellant should be restrained from dissipating that

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security. The objections that it does not appear that the 160 acres are worth the \$1,600 of prior encumbrances assumed by appellant or that the other securities of appellees are insufficient, are not well taken by appellant in view of his confession of the appellees' averment that the release of the indemnifying mortgage would impair their security and cause them irreparable loss.

Judgment affirmed.

THE STATE v. CADWALLADER.

[No. 18,795. Filed May 29, 1900.]

CRIMINAL LAW.—Banks and Banking.—Insolvency.—Embezzlement.

—Under §2081 Burns 1894 making it unlawful for an insolvent bank to receive a deposit from any person not indebted to it, the indebtedness of the depositor must be upon a claim or demand held by the bank against such depositor equal to or in excess of the deposit, and due from him at the time of the deposit. *p. 610.*

SAME.—Banks and Banking.—Insolvency.—Embezzlement.—Evidence.

—In a prosecution under §2081 Burns 1894 making it unlawful for an insolvent bank to receive a deposit from any person not indebted to the bank upon a matured claim or demand to an amount equal to or in excess of the deposit, the State is not required to prove that such depositor was not indebted to any of the bank's officers. *pp. 610, 611.*

SAME.—Banks and Banking.—Insolvency.—Embezzlement.—Evidence.

—In the prosecution of a bank official under §2081 Burns 1894 for receiving a deposit when the bank was insolvent, the State is not required to allege and prove that the officer knew that the bank was insolvent at the time he received the deposit as such want of knowledge is matter in defense. *p. 611.*

SAME.—Banks and Banking.—Insolvency.—Embezzlement.—Knowledge of Officer.

—An officer of a bank who receives a deposit when the bank is insolvent in violation of §2081 Burns 1894 is not relieved from liability under the statute by his lack of knowledge of the insolvent condition of the bank where his ignorance of such insolvency was due to his own fault or negligence. *pp. 611, 612.*

SAME.—Banks and Banking.—Insolvency.—Embezzlement.—Knowledge of Officer.—Presumption.—Evidence.

—The presumption that a bank official who had been president of the bank for three years knew of the insolvent condition of the bank at the time he received a deposit may be rebutted by evidence that in fact he, without his own negligence or fault, was ignorant of the true condition of the bank at the time the deposit was received. *pp. 612-616.*

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From the Randolph Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *C. L. Hutchens*, *T. Hutchens*, *J. W. Ryan* and *W. A. Thompson*, for State.

E. L. Watson, *J. S. Engle*, *J. J. Cheney* and *T. Shockney*, for appellee.

JORDAN, J.—The appellee was charged by indictment with having violated the statute defining the crime of embezzlement by bankers and brokers. A trial by jury resulted in his acquittal, and this appeal is prosecuted by the State upon the questions of law reserved by it relative to certain instructions given to the jury by the lower court on its own motion.

The evidence is not in the record, therefore, if the instructions of which the State complains can be said to be proper, upon any supposable evidence which might have been introduced upon the trial, under the issues in the case, this appeal can not be sustained.

It is first insisted by the appellee that the bill of exceptions embracing the instructions given by the court is not properly in the record. An examination of the transcript discloses that the verdict of the jury was returned on the 18th day of November, 1897, the same being the 16th judicial day of the November term, 1897, of the Randolph Circuit Court. A judgment thereon discharging the defendant was rendered on the same day.

The following entry appears in the proceedings: "And afterwards, to wit, on the 7th day of December, 1897, the same being the thirty-second judicial day of the November term, 1897, the following bill of exceptions was filed by the prosecuting attorney in the office of the clerk of the Randolph Circuit Court." Immediately following this entry appears the bill of exceptions containing all of the instructions given in the cause. The reason assigned by counsel for appellee that the bill in question is not in the record is that it does not appear that it was filed in the office of the clerk of the lower court. This insistence is in no manner

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supported by the record, but, upon the contrary, it is affirmatively disclosed that the bill was signed by the trial judge, and filed by the State in the office of the clerk during the term in which the cause was tried. Consequently, under the circumstances, there can be no question but what the bill is properly a part of the record.

The indictment in this case, among other things, charges that appellee was, on the 2nd day of May, 1896, president of an incorporated banking company by the name and style of the Citizens Bank, situated in Randolph county, Indiana, and doing a banking business therein; that appellee, on the said 2nd day of May, as such president, at the said county and State, unlawfully, feloniously, and fraudulently received from one Charles Shultz the sum of \$60 as a deposit in said bank, said bank at that time being then and there insolvent, which fact of insolvency was then and there well known to the appellee; and that by reason of said insolvency the money so deposited was lost to the said Shultz, etc.

Section 2031 Burns 1894, upon which this prosecution is based, is as follows: "If any banker, or broker, or person or persons doing a banking business, or any officer of any banking company, or incorporated bank doing business in this State, shall fraudulently receive from any person or persons, firm, company or corporation, or from any agent thereof, not indebted to said banker, broker, banking company or incorporated bank any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery, when, at the time of receiving such deposit, said banker, broker, banking company or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, said banker, broker or officer, so receiving such deposit, shall be deemed guilty [of] embezzlement, and upon conviction thereof, shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto may be imprisoned in the state prison not less than one, nor more than three years.

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"The failure, suspension or involuntary liquidation of banker, broker, banking company or incorporated bank, within thirty days from and after the time of receiving such deposit, shall be *prima facie* evidence of an intent to defraud, on the part of such banker, broker or officer of such banking company or incorporated bank."

The court's charge to the jury embraces forty-two separate instructions. In respect to these the State addresses its objections and criticism more especially to numbers six, thirteen, eighteen, and twenty-one. By the sixth charge the court enumerated and stated to the jury what essential facts the State was required to establish in order to justify a conviction of the accused. Among the facts enumerated by this charge, as necessary to be proved by the State in order to convict the defendant, are: (1) That at the time the deposit in question was made the bank in controversy was insolvent; (2) that at that time the depositor was not indebted to said bank; (3) that he was not indebted to any of the bank's officers; (4) that the defendant knew that the bank was insolvent. The charge closed with the statement that a failure by the State to establish any one of these facts beyond a reasonable doubt would require the acquittal of the defendant.

The first proposition is a correct statement of the law. The second may also be approved, with the exception that the jury ought to have been advised that the indebtedness of the depositor contemplated by the statute in question must be upon a claim or demand held by the bank against such depositor and due from him at the time of the deposit and equal to or in excess of the amount deposited. *State v. Beach*, 147 Ind. 74, 36 L. R. A. 179.

The insolvency of the bank and the absence of indebtedness to it upon the part of the depositor, as stated, were both, under the statute above set out, essential elements of the alleged offense for which the defendant was prosecuted in this action. Upon no view of the case, however, can the

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third and fourth propositions embraced in the charge in controversy be sustained. While it is true that it was incumbent upon the State, as heretofore said, in order to establish the guilt of the accused, to prove that at the time of the deposit the depositor was not indebted to the bank, upon a matured claim or demand to an amount equal to or in excess of the deposit, still, the State was not required to go beyond this and also prove that such depositor was not indebted to any of the bank's officers. The trial court, by this statement to the jury, injected into the case a fact not legitimately at issue therein, and one upon which the successful prosecution of the defendant in no manner depended. In respect to the fourth proposition it may be said that the statute upon which this prosecution rests is silent in regard to the knowledge of the accused party of the insolvency of the bank at the time the deposit is received; and such knowledge can not be said to be such an essential fact of the offense as would require of the State to allege it in its pleading, and prove the same upon the trial, in order to secure a conviction. The absence of such knowledge, however, may be shown by the accused upon the trial, as a matter of defense, to justify his act in receiving the deposit when the bank was insolvent. Therefore, if, upon a consideration of all of the evidence given in a case upon a prosecution under the statute in dispute, it should appear that the accused party had no knowledge of the bank's insolvency at the time the deposit was made, or if a consideration of the evidence and all the legitimate inferences arising therefrom creates, in the minds of the jury trying the cause, a reasonable doubt as to the defendant's knowledge of such fact, then, in either event, he should be acquitted. If in fact, however, the one accused of the crime defined by this statute is really ignorant of the insolvent condition of the bank at the time the deposit is received, and such ignorance upon his part is not superinduced by his own fault or negligence, he may upon his trial avail himself of such want of knowledge as a defense to

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relieve him of the evil intent to defraud, and thereby be absolved from criminal liability. *Squire v. State*, 46 Ind. 459; *Payne v. State*, 74 Ind. 208; 1 Bishop's New Crim. Law, §303.

By instruction thirteen the jury was informed that the president of the bank is presumed to know, and that it is his duty to know, whether or not his bank is solvent, and he is presumed to know all that the books of the bank disclose in regard to its liabilities, their character, and amount, and the date of their maturity, the assets of the bank, their extent, character, and value, and their availability to meet and pay the bank's liabilities as they may be presented to it in the ordinary course of its business. The instruction closes with the following statement: "This, however, is not a conclusive presumption. If, as a matter of fact, from negligence or any other reason, he does not know that it is insolvent, he can not be criminally responsible for such negligence."

The State assails (and properly so, we think,) this part of the charge which excuses the lack of knowledge of the insolvent condition of the bank upon the part of the defendant when it appears that his ignorance of such insolvency is due to his own negligence or fault. By this latter instruction the court, after stating to the jury, in effect, at least, that the defendant, as the president of the bank in controversy, was presumed to know whether or not it was solvent, and that it was his duty to know such fact, broadly advises them that if by reason of the defendant's negligence, or any other reason, he does not know that the bank is insolvent, he is not criminally responsible under such circumstances.

The statute, under which the defendant's bank is alleged to have been organized, provides that the directory shall elect one of their number president of the bank, and, as the defendant herein was the president of the bank, it may be assumed that he was also one of its directors. The very object or purpose of the statute is to prevent bankers, brokers and bank officials, by subjecting them to a crimina l

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prosecution, from receiving deposits when their bank is insolvent.

It is certainly evident that the solvency or insolvency of a banking institution is a matter which may be said to be peculiarly within the knowledge of its directors and its other managing officers, and it may therefore be presumed that its directory and such other managing officials, so long as they continue to operate, the bank, know whether it is solvent or insolvent. Depositors, as a rule, have no means of accurately ascertaining the true financial condition of a bank, and they must necessarily act upon the presumption that the directors and the other officers thereof are not violating the law by keeping the bank open, and receiving deposits when it is insolvent. It is the imperative duty of such officers, when they receive deposits from the bank's patrons, to know that the bank is solvent, if, under the circumstances, by the exercise of reasonable diligence, such fact could have been ascertained. If, by the exercise of such diligence, in making an examination and inquiry in respect to the solvency or insolvency of the bank, its true condition could have been discovered, then, under such circumstances, the presumption will be that they had knowledge of the bank's condition at the time the particular deposit was received. When tested by the rule which we assert, it must be held that the defendant in this case, under the facts, was charged with the duty of knowing the condition of his bank at the time he received the deposit in question, and if at that time it was insolvent, the inference or presumption would arise that he, as such director or president, had knowledge of such insolvency.

While it is true that the defendant upon the trial would be entitled to rebut or overthrow this adverse presumption, still he would not be permitted to avail himself of his own negligence or carelessness as an excuse for want of knowledge in regard to the insolvency of the bank. Of course, if the accused person is ignorant of the insolvent condition of the bank, because sufficient time and opportunity have not

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been afforded him to discover its true condition before receiving the deposit, a different question will be presented. If the party charged with a violation of the statute in question could be permitted to shield himself behind his own negligence or carelessness, and thereby excuse his want of knowledge of the bank's insolvency at the time the deposit was received, then the statute which was designed to furnish protection to depositors would be of no avail in securing such protection.

In the case of *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, the supreme court of that state, in a prosecution under a statute which is substantially the same as that upon which this prosecution is based, said: "If one is a banker or person doing a banking business, and receives on deposit the money of his customer, it is to be presumed that he knows, at the time of receiving such deposit, whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent, and it is criminal negligence for him not to know of his own insolvency."

It can not be presumed that it was the intention of the legislature, in the enactment of the statute in controversy, to inflict a penalty upon a banker or bank official for receiving a deposit when at the time of receiving the same he was actually ignorant of the bank's insolvency, by reason of his not being afforded sufficient time and opportunity to discover that fact before receiving the deposit. See *State v. Beach*, 147 Ind. 74, 83, 36 L. R. A. 179.

It may be asserted that when it appears that the person accused of violating the statute in question is shown to have exercised due diligence, under the circumstances, to acquaint himself with the condition of the bank, but nevertheless, at the time of receiving the deposit, he, considering all of the circumstances, had good reasons to believe, and did honestly

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believe, that the bank was solvent, then, under such circumstances, he will be absolved from criminal liability. *Squire v. State*, 46 Ind. 459; *Goetz v. State*, 41 Ind. 162; *Ward v. State*, 48 Ind. 289; *Payne v. State*, 74 Ind. 203.

The rule which obtains under such circumstances is well stated by an eminent author as follows: "The wrongful intent being the essence of every crime, it necessarily follows that whenever one without fault or carelessness is misled concerning facts, and thereon acts as he would be justified in doing were they what he believes them to be, he is legally innocent the same as he is innocent morally. The rule in morals is stated by Wayland to be that if a man 'know not the relations in which he stands to others, and have not the means of knowing them, he is guiltless. If he know them, or have the means of knowing them, and have not improved these means, he is guilty.' The legal rule is neatly enunciated by Baron Parke, thus: 'The guilt of the accused must depend on the circumstances as they appear to him.'" 1 Bishop's New Crim. Law, §303, subd. 3; *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2.

By charge eighteen the court instructed the jury that if they believed from the evidence, beyond a reasonable doubt, that the defendant had been a director and president of the bank in controversy continuously for three years prior to the day upon which he received the deposit in question, and that during all of said time he was in the active management and control of the business of the bank, and if they further believed from the evidence that the bank on that day was insolvent, then the presumption would be that the defendant knew of its insolvent condition, but that such presumption would not be conclusive, and that it might be shown as a matter of fact that the defendant did not know that the bank was insolvent. The objection urged by the State to this charge is that the court erred in advising the jury that the presumption, under the facts stated, in respect to the defendant's knowledge of the insolvency of the bank,

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was not conclusive, but might be rebutted. The charge can not be held to be erroneous upon this ground for the defendant certainly had the right to overcome such adverse presumption by showing by legitimate evidence that, in fact, he, without his own negligence or fault, was ignorant of the true condition of the bank at the time the deposit was received. It may be said, however, in this connection that a trial court in charging a jury in respect to the presumption of a fact should not go further than to direct the attention of the jury to their right to draw the inference. It is not proper for the court to attach weight or value to such inference or inferences, as that is the exclusive province of the jury. *Smith v. State*, 58 Ind. 340.

By reason of the errors pointed out in the charge of the court, we are compelled to sustain this appeal at the cost of the appellee. Appeal sustained.

Monks, J., did not participate in the decision of this appeal.

ROUNDENBUSH ET AL. v. MITCHELL, SURVEYOR, ETC.

[No. 18,815. Filed May 29, 1900.]

DRAINS.—Maintenance.—Allotment.—The facts that lands were not assessed for the construction of the drain, and that it had been adjudged when the drain was projected that they would not be benefited by its construction, will not exempt such lands from liability for the maintenance of the drain under the provisions of §5633 Burns 1894. *p. 618.*

SAME.—Maintenance.—Allotment.—Constitutional Law.—The act of 1889, §§5632–5636 Burns 1894, providing for the allotment of the work of maintaining a public drain is not unconstitutional as taking private property for public use without just compensation, and without due process of law, since the statute makes ample provision for notice to the landowners, and for a hearing upon all questions of law and fact, not only before the drainage commissioner, but, on appeal, in the circuit or superior court of the county, and by the express terms of the statute, there can be neither assessment nor allotment in the absence of equal compensating benefits. *p. 620.*

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From the Hamilton Circuit Court. *Affirmed.*

I. W. Christian and W. S. Christian, for appellants.

F. E. Gavin, T. P. Davis and J. L. Gavin, for appellee.

DOWLING, J.—This is a proceeding under the provisions of the act of 1889 for an allotment of the work of keeping a public drain in repair. Acts 1889, p. 53, §§5632-5636 Burns 1894.

The appellee, who was the county surveyor, and, *ex officio*, a drainage commissioner, in pursuance of §5633, *supra*, after notice duly given to the persons to be affected, apportioned to each parcel of land benefited by a public drain in Hamilton county, a division thereof, to be cleaned out annually and kept in repair by the owner of each of said tracts. This apportionment was made upon the basis of the benefits alleged to be received.

Roundenbush, together with some ten other persons, appeared before the surveyor, at the time and place named in the notice, and objected to the allotment made by that officer. Their objections were overruled.

A joint appeal from the allotment so made was taken by the objectors to the Hamilton Circuit Court. A copy of the record of such allotments, and of the objections made thereto, was filed, and these properly constituted the pleadings upon such appeal. §5636 Burns 1894; *Romack v. Hobbs*, 13 Ind. App. 138.

The appellee demurred to each objection for the insufficiency of the facts stated, and his demurrers were sustained to all of the objections, excepting the *fifth* and *sixth*, which were thereupon withdrawn. The appellants refusing to plead further, the court rendered judgment on the demurrers in favor of the appellee.

The errors assigned question the correctness of the decision of the court upon the demurrers to the objections.

The substance of the *first*, *second*, *third*, and *fourth* objections was that the lands of the appellants were not among

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those assessed for the *construction* of the drain, and that it had been adjudged by the Hamilton Circuit Court that said lands were not benefited by said drain, and were not liable to assessment for the construction thereof. It was also averred that the attempt to subject appellants to a portion of the burden of maintaining the said drain was a collateral attack upon the said judgment.

In the *seventh* objection, it was alleged that the proposed allotment was in violation of both the federal, and State Constitutions, because it sought to take private property for public use without just compensation, and without due process of law.

It is apparent from the language of the statute that the facts that the lands of the appellants were not assessed for the construction of the drain, and that it had been adjudged when the drain was projected that they would not be benefited by its construction, did not exempt those lands, and their owners, from future liability for the *maintenance* of the drain.

Provision is made in the act for allotting the work of maintaining the drain to two distinct classes of persons, viz.: *First*, the owner of each tract of land, etc., which had been assessed for the original construction of the drain; and, *second*, the owner of each tract subsequently benefited by the drain, without regard to the original assessment, the statute being as follows:

"Section 5633. It shall be the duty of the county surveyor in each county in this State in which any such ditch or drain, or part thereof, is located, to proceed to view and examine each and every such ditch or drain within his respective county, and to fix and determine the portion thereof that the owner of each tract of land and each corporation, county or township, assessed for the construction thereof should annually clean out and keep in repair, *and shall also, at the same time, set apart and apportion to each parcel of land, and to each corporate road or railroad, and to the*

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township where public highways are benefited, a share or portion of such ditch or drain, according to the benefits to be received thereby, to be cleaned out annually and kept in repair by the owner of each tract of land or by such corporate road or railroad or by the township."

The expediency of such a provision is obvious. It might easily result from natural causes, or from artificial changes in the condition of the lands in the vicinity of a public drain, that tracts not originally benefited by the construction of the ditch, nor in any way dependent upon it for drainage, would, afterwards, derive valuable advantages from its maintenance. The obstruction of natural waterways, or a change in the course of creeks or rivers, the drainage and reclamation of large areas of marsh lands, the cutting down of forests, or other alterations in the condition or use of neighboring real estate, might effect such change.

Or, the construction of new and convenient highways, rendered practicable only by the reclamation of areas of wet lands by the construction of a public drain, might add to the convenience and increase the value of lands which were, at first, properly held unaffected by the construction of the drain.

On the other hand, lands originally assessed for the construction of the drain might cease to be benefited, and, therefore, become exempt from allotments for repairs, or, if liable, responsible only in a reduced ratio. *Park County Coal Co. v. Campbell*, 140 Ind. 28; *Chambliss v. Johnson*, 77 Iowa, 611, 42 N. W. 427.

The suitable maintenance of a public drain is, in most cases, quite as necessary as its original construction. The power to assess for that purpose continues so long as the drain exists, and is of public utility, and may be exercised, from time to time, upon the lands and their owners according to the benefits received. *Johnson v. Lewis*, 115 Ind. 490; *Kirkpatrick v. Taylor, Treas.*, 118 Ind. 329; *Zimmerman, Treas., v. Savage*, 145 Ind. 124; *Romack v. Hobbs*,

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13 Ind. App. 138; *Beatty v. Pruden*, 13 Ind. App. 507; *Morrow v. Geeting*, 15 Ind. App. 358.

The cases cited by appellants in their brief are not applicable here. This proceeding, as has been stated, was taken under the act of 1889. *Romack v. Hobbs*, *supra*, and *Park County Coal Co. v. Campbell*, 140 Ind. 28, referred to by appellants were decisions under the act of 1885. That statute contains no provision for allotments upon lands other than those originally assessed for the construction of the drain.

The appellants next contend that this proceeding is *unconstitutional*, for the reason that under it private property is sought to be taken for public use without just compensation, and without due process of law.

There is nothing in this objection. The statute makes ample provision for notice to the landowner, and for a hearing upon all questions of law and fact, not only before the surveyor, or drainage commissioner, but, on appeal, in the circuit or superior court of the county. By the express terms of the law there can be neither assessment nor allotment in the absence of equal compensating benefits. Under such circumstances, the validity of like statutes, uniformly, has been upheld. *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569; *State v. Stewart*, 74 Wis. 620, 43 N. W. 947; *Morrow v. Geeting*, 15 Ind. App. 353; *Park County Coal Co. v. Campbell*, 140 Ind. 28; *Lipes v. Hand*, 104 Ind. 503; *Weaver v. Templin*, 113 Ind. 298; *Moffit v. Medsker, etc., Assn.*, 48 Ind. 107; *Etchison, etc., Assn. v. Hillis*, 40 Ind. 408; *State v. Johnson*, 105 Ind. 463; *Swain v. Fulmer*, 135 Ind. 8; *Fries v. Brier*, 111 Ind. 65; *O'Reiley v. Kankakee, etc., Co.*, 32 Ind. 169; *Trimble v. McGee*, 112 Ind. 307; *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. 357; *Gifford Drainage Dist. v. Shroer*, 145 Ind. 572.

The demurrers to the objections filed by the appellants were properly overruled, and we find no error in the record. Judgment affirmed.

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THE STATE, EX REL. COLSCOTT, v. KING, AUDITOR, ETC.

[No. 18,821. Filed May 29, 1900.]

COUNTIES.—Records.—Examination by Taxpayer.—A citizen and taxpayer of the county has such an interest as entitles him to examine the records and papers in the county auditor's office, under proper regulations, for the purpose of ascertaining the condition of the administration of the fiscal affairs of the county. *pp. 621-627.*

SAME.—Records.—Examination by Taxpayer.—The fact that the board of commissioners of the county is invested with the power and duty to audit the accounts of all officers, and has the care and management of the public money does not deprive a citizen and taxpayer of the county of the right to examine the records of the county auditor's office for the purpose of ascertaining the condition of the public funds. *pp. 627, 628.*

SAME.—Records.—Examination by Taxpayer—Mandamus.—Mandamus is the proper remedy to enforce the right of a citizen and taxpayer of the county to examine the records in the county auditor's office. *p. 629.*

From the Union Circuit Court. *Reversed.*

G. C. Florea and L. L. Broadus, for appellant.

F. M. Alexander and S. S. Harrell, for appellee.

JORDAN, J.—This is an appeal by the relator from a judgment on demurrer for insufficiency of facts to his petition for a writ of mandamus against appellee, the auditor of Franklin county, to compel him to allow the relator an inspection of the public records and papers of the auditor's office of said county. The action was originally instituted in the Franklin Circuit Court, but was subsequently venued to the Union Circuit Court. A single question is presented: Did the court err in sustaining the demurrer of the appellee to the petition?

An epitome of the facts alleged in the petition may be said to be as follows: The relator, John A. Colscott, is a citizen and resident of Franklin county, Indiana, and a taxpayer therein, and had been a resident and taxpayer of that county for over ten years prior to the beginning of this

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action. He avers in his petition that he prosecutes this suit on his own behalf and on behalf of all other citizens and taxpayers of said county who are aggrieved by the wrongs set out in the petition. On March 18, 1898, appellee, George B. King, was the auditor of said county, and was, as such officer, legally in the possession of the books, records, and papers belonging to his said office. On that day the relator went to the auditor's office in the town of Brookville to inspect and examine the public records, books, papers, and files of said office for the purpose of ascertaining whether said books and records, etc., were legally and properly kept, and especially for the purpose of discovering whether the money and property of the county had been duly accounted for by the persons and officers charged with the collection and disbursement of the same, and to ascertain whether any money was due to said county from any person or persons. The petitioner further shows that he desires such inspection and the information to be obtained thereby as a citizen and taxpayer for the purpose of pursuing, if necessary, the proper legal remedies to enforce the collection of any moneys or demands that may be due the county, and to require the proper authorities to enforce such demands, and that he is not prompted in his desire for the inspection in question by any motives of idle curiosity, and that he does not intend in any way or manner to interfere with or interrupt the orderly administration of the affairs of said office in the said inspection or examination. He alleges that he requested and demanded of appellee, as such auditor, that he allow him, in connection with two competent accountants as his assistants, to have access to the public books, records, and papers of said auditor's office and that he, together with said accountants, be by said auditor permitted to inspect and examine such books, records, and papers of the office as related to or pertained to the fiscal accounts of said county, for the purposes as aforesaid mentioned, and that he be permitted to make such extracts and copies of said

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records and papers as may be necessary and pertinent to said examination, and that he be allowed to continue the inspection of said books and records from day to day in said auditor's office in the presence of the appellee, if the latter so desired to be present, until said inspection or examination is completed.

It is disclosed by the petition that for a long time prior to the making of said demand for the inspection in question, the relator and many other citizens and taxpayers of said Franklin county believed that there had been an unlawful conversion and use of the public funds thereof, and they desired that the public records of the auditor's and treasurer's offices be examined, in order to ascertain or discover the true condition of the administration of the fiscal affairs of said county. The relator, as it is disclosed, was a member of a committee appointed by numerous taxpayers of the county to secure the inspection of the public records.

The petition further shows that the defendant, as such auditor, refused, and still refuses, to allow the relator to have an examination of the records and papers of his said office. It is also alleged that a more particular description of the books, records, and documents, which the relator desires to examine, can not be given, for the reason that they are in the possession of the defendant. The petition closes with a prayer for a writ of mandamus awarding to the relator, together with his two agents or assistants, the right to inspect or examine the records and papers of said auditor's office for the purposes stated, and for all other and proper relief.

The defendant appeared to this action, and waived the issuing of the alternative writ, and demurred to the petition, with the result as hereinbefore stated.

Counsel for appellee insist, (1) that, even though the relator can be held to be entitled to the right which he demands, such right can not be enforced by mandamus; (2) that, under §7830 Burns 1894, §5745 R. S. 1881 and

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Horner 1897, the legislature has invested the board of commissioners of the county with the duty and power to audit the accounts of all officers, and have the care, management, collection, and disbursements of public money; and that under §7995 Burns 1894, §5917 R. S. 1881 and Horner 1897, it is provided that the county treasurer shall at all times keep his books and office subject to the inspection of such board of commissioners; hence, it is contended that, under these statutory provisions, the right and duty of the county commissioners to inspect and examine the records must be held to be an exclusive one, and impliedly deprives any citizen or taxpayer of that right, when he seeks to exercise it for the purpose which the relator alleges he has in view.

It is further contended that the examination sought to be obtained herein is incompatible with public policy, inasmuch as it might subject the public records to loss and mutilation, and also seriously interfere with the duties of the office and will consume the time of public officials without compensation.

Section 7831 Burns 1894, §5746 R. S. 1881 and Horner 1897, provides that, "All the books, accounts, vouchers, papers and documents, touching the business or property of the county, shall be carefully kept by the auditor and open to the inspection of any person". There can be no doubt but what the legislature, under this statutory provision, has expressly recognized the right of any person to inspect the public records, books, files, papers, and documents belonging to or kept in the office of the county auditor. The legislative command, under this section, is plain and emphatic, and may be easily interpreted. Of course this right of inspection is not to be viewed as one wholly unqualified or free from all restrictions, but must be accepted and exercised by the inspector in such a manner as not materially to interrupt or interfere with the officer in the administration or discharge of his official duties.

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The general rule which obtained at common law was that every person was entitled to an inspection of public records, by himself or agent, provided he had an interest in the matters to which such records related. Where, however, the inspection desired was merely to gratify idle curiosity, or motives which were purely speculative, the right of inspection, under the common law, was denied. 20 Am. & Eng. Ency. of Law, pp. 521, 522, and authorities cited in footnote 2, p. 522.

It is evident, under the facts in this case, that the relator asserts no other interest or right upon which to base his demand for an inspection of the records in question than that which is common to any and all other citizens and taxpayers of Franklin county, and that he is interested in the information which he seeks, by virtue of the inspection desired, only to the extent of a citizen and taxpayer of that county. He expressly disclaims in his petition that he is actuated or prompted to secure the inspection in controversy through mere curiosity, but alleges that he rests his demand to examine and search the public records in the custody of the defendant upon the facts that he is a citizen and taxpayer of the county, and that he desires, by the means of such an examination, to discover the condition of the public revenue, and to ascertain if the affairs of his county have been honestly and faithfully administered by the public officials charged with that duty.

Aside from the statute to which we have referred, we are of the opinion that the relator, under the facts presented by his petition, has shown such an interest in the matters to which the records and papers in the offices of the auditor and treasurer of his county relate as would entitle him to a general inspection thereof for the purpose which he has in view. These public records are the property of the county, and are not the property of the officer in whose custody they have been placed. The latter is but the mere custodian thereof. It is his imperative duty to keep them safe for the

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use and benefit of the office to which they belong, and also for the use and benefit of the public. Certainly the officer or custodian has the right, and it is his duty, in the control of an inspection or examination by any person, to keep a general surveillance over such records and papers and make and enforce such reasonable rules or regulations in regard to their inspection and use as will prevent such inspection from materially interfering with or hindering him in the discharge of the functions or duties of his office, and also to prevent the mutilation or loss of such records and papers.

A county may be said to be an involuntary public corporation organized by the State as an instrumentality in the furtherance of its government. The people residing therein are virtually the corporators. As taxpayers they contribute to the public revenue, and as voters they select the public officials who are to administer the county's affairs. Surely, under such circumstances, they retain or have a great interest in the proper management of the business and matters pertaining to their county, and, therefore, are entitled to know whether the public officials, whom they have selected to represent them, have properly used, disbursed, and accounted for the public funds which, under the law, have been confided to their custody and administration.

The various county officials, in a political sense, are considered as the agents of the people in managing and conducting the business of the county. These officials are commonly denominated—and properly so—"public servants", and are directly responsible to the people who select them for the honest and faithful discharge of the duties and powers with which, under the law, they are invested. Under such conditions and circumstances, as they exist under the peculiar structure or genius of our government, it would certainly be a harsh interpretation of our laws, and one which would be, in our opinion, adverse to sound reason, to deny any taxpayer or citizen the right, subject to the reasonable rules and regulations previously mentioned, to in-

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spect or examine the public records of his county in order to discover or ascertain whether the public officers had properly administered the funds of the county to which such taxpayer had been required to contribute. In fact there can be no sound reason advanced for depriving a citizen of this right, for it is evident that the exercise thereof, for the purpose in view in this case, will serve as a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service.

It has been a well recognized rule of the law that a corporator of a municipal corporation has the right to have a general inspection of the public records and documents of such corporation, and to make copies thereof under such rules and restrictions as will preserve such records from loss and mutilation, and prevent any material interruption of the duties of their custodian. That this rule, under the facts in the case at bar, is applicable, and ought to control, cannot be controverted upon any reasonable grounds.

Mr. Dillon, in his valuable work on municipal corporations, in treating of the right of a corporator to inspect the corporate records, says: "The following points have been ruled as stated by Mr. Willcock: Every corporator has a right to inspect all the records, books, and other documents of the corporation, upon all proper occasions; and if upon application for that purpose, the officer who has the custody refuse to shew them, the court will grant a mandamus to enforce his right." 1 Dillon Mun. Corp. (4th ed.) §303; *People v. Cornell*, 47 Barb. 329.

There is no force in the contention of appellee that, by reason of the fact that the board of commissioners of a county is charged with the duty of inspecting the records of the treasurer's office, therefore, all citizens and taxpayers must be held to be excluded from an inspection or examination of such records.

It must be presumed, under the facts, that the relator

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and other citizens and taxpayers of the county have, as they should, an interest in the manner in which the public affairs of their county are conducted, and such interest is not, nor can it be presumed to have been, relinquished by them by reason of the fact that they have chosen certain officials to represent them, whose duty, under the law, is to see that the public affairs are properly conducted. They must still be held to have a right to ascertain for themselves this fact and to be informed, if they desire, in respect to the official acts of their officers or servants in the management of the business of the county, and for this purpose, at least, they ought to be accorded the right to obtain all the knowledge and information which can be afforded them through an inspection of the records and documents belonging to the public offices of the county.

Counsel for appellee rely upon such cases as *Webber v. Townley*, 43 Mich. 534, 5 N. W. 971, *Buck v. Collins*, 51 Ga. 391, and others of like character, wherein it is held that, at common law, there is no right to inspect and make copies of public records for speculative purposes, by making abstracts of such records with a view to their future sale and use. These cases, however, cannot be considered as authoritative upon the point involved in this appeal. The principle upon which they are decided has been denied by the supreme court of Michigan since the case of *Webber v. Townley*, *supra*, was decided, and the latter case is expressly overruled in *Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73. In this last appeal, Morse, J., speaking as the organ of that court, said: "I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record

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is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for the purposes of selling such information, if I desire." This statement, upon the question involved in the case from which we quote, we consider the correct doctrine.

The conclusion at which we have arrived in this appeal is fully supported by the following authorities, in addition to those heretofore cited: *State v. Williams*, 41 N. J. L. 332; *State v. Rachac*, 37 Minn. 372, 35 N. W. 7; *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30; *People v. Richards*, 99 N. Y. 620, 1 N. E. 258; *People v. Reilly*, 38 Hun 429; *Hawes v. White*, 66 Me. 305; *O'Hara v. King*, 52 Ill. 303; *Boylan v. Warren*, 39 Kan. 301.

The relator, being entitled to the right which he seeks, there can be no question but what mandamus is the proper remedy for its enforcement. That it is the proper remedy is recognized by many of the cases hereinbefore cited, and, in addition to those in support of this point, see the following authorities: *Wampler v. State*, 148 Ind. 557, 38 L. R. A. 829; High on Ex. Leg. Rem. §74; 14 Am. & Eng. Ency. of Law, p. 171.

The right to inspect the records in question also impliedly awards to the person entitled to it sufficient time, under the circumstances, in which to make the inspection for the purpose contemplated. We are constrained, therefore, to conclude that the relator in this case, under the facts, is entitled to the inspection which he demands, and also entitled to make such copies and abstracts of the records as may avail him in carrying out the purpose of his examination, subject, however, to the conditions and restrictions mentioned in this opinion.

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It follows that the petition was sufficient, and that the demurrer thereto ought to have been overruled, and the defendant required to answer.

For error of the court in sustaining the demurrer to the petition, the judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

SHENKENBERGER v. THE STATE.

[No. 18,940. Filed May 29, 1900.]

PRACTICE.—Evidence.—Offer to Prove.—Appeal and Error.—No question is presented on the ruling of the court in excluding the answer to a question propounded to a witness, where the offer to prove was not made until after the objection to the question was sustained and an exception reserved. *pp.* 634, 635.

EVIDENCE.—Dying Declarations.—Criminal Law.—It is not necessary that a dying declaration be made in the presence of defendant in order to render it admissible in the trial of a murder case. *pp.* 635, 636.

SAME.—Dying Declarations.—Criminal Law.—An objection to the admission in evidence of dying declarations in the trial of a murder case, on the ground that the written statement was the best evidence, was properly overruled, where it was not shown that the declaration testified to was reduced to writing. *pp.* 635, 636.

SAME.—Objection.—Appeal and Error.—An objection to the admissibility of evidence which was not presented in the trial court will not be considered on appeal. *p.* 636.

SAME.—Dying Declarations.—Criminal Law.—In a prosecution charging defendant with poisoning her daughter-in-law, the dying declaration of deceased testified to by a witness that "This was a strange death to die, to be poisoned by her mother-in-law" was the statement of a fact, and was properly admitted in evidence. *pp.* 636-639.

INSTRUCTIONS.—Evidence.—An instruction containing language which casts suspicion upon or disparages or discredits any class of evidence is erroneous. *pp.* 639, 640.

SAME.—Reasonable Doubt.—Criminal Law.—An instruction in a criminal case informing the jury that if any one of them entertained a reasonable doubt upon the evidence "the jury in such case cannot find the defendant guilty," was a misleading and inaccurate statement of the law, and was properly refused. *pp.* 640-644.

APPEAL AND ERROR.—Separation of Jury.—Objection Made for the First Time on Appeal.—An objection to the action of the court in

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permitting the jury to separate at its adjournments, in the trial of a murder case, will not be considered on appeal, where no objection thereto was made in the court below. *p. 644.*

MISCONDUCT OF COUNSEL.—Waiver.—Appeal and Error.—A cause will not be reversed because of the alleged misconduct of counsel, where the statements objected to were promptly withdrawn by the court from the consideration of the jury and no motion to set aside the submission and discharge the jury was made. *pp. 644, 645.*

From the Clinton Circuit Court. *Affirmed.*

O. E. Brumbaugh and J. Combs, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores and C. C. Hadley*, for State.

DOWLING, J.—Indictment for murder in the first degree by administering poison. Pleas of not guilty, and insanity. Verdict of guilty, and punishment fixed at imprisonment for life. Motion for a new trial overruled, and judgment on verdict.

The errors assigned, and not waived, call in question the action of the court in overruling appellant's motion for a new trial.

The specific charge contained in the indictment is that the appellant, Sarah Shenkenberger, on the 25th day of August, 1898, at the county of Clinton, in the State of Indiana, unlawfully, feloniously, purposely, and with premeditated malice, killed and murdered one Belle Shenkenberger, by then and there, feloniously, etc., administering to the said Belle Shenkenberger a deadly poison, commonly called arsenic, which the said Belle Shenkenberger then and there received at the hands of the said Sarah Shenkenberger, and swallowed, and by reason thereof died; the said Sarah Shenkenberger, then and there, well knowing the said arsenic to be a deadly poison, and wickedly intending thereby feloniously, etc., to kill and murder the said Belle Shenkenberger.

A brief narrative of the material facts shown by the evidence will, perhaps, render more easily intelligible the points necessary to be examined in this opinion.

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The appellant, at the time named in the indictment, was about fifty-five years of age, was a married woman, and was living with her husband in the town of Frankfort, in Clinton county, Indiana. Belle Shenkenberger, the person alleged to have been poisoned by her, was the wife of a son of the appellant, who appears to have been a shiftless and roving character, without means, or regular employment, and with little inclination to provide for his family. As a result of his improvidence and neglect, his wife, during a large part of her married life, was compelled to make her home with his parents, going away with her husband several times, but, as often, returning to their house. On the 30th of July, 1898, after a short absence, Belle Shenkenberger, with an infant son, came back to the residence of the appellant. She was pregnant, and her health was not good. August 1st she had a miscarriage, which left her greatly prostrated. Her weakness continued, with occasional periods of improvement in her condition, but, during a considerable part of the time, she was confined to her room or bed. The appellant cooked for her, did her washing and ironing, and waited upon her. For a few days before the death of Belle Shenkenberger, her own mother, and a neighbor or two, assisted appellant in nursing and taking care of her.

On the 19th of August, 1898, appellant purchased at a drug store a nickel's worth of arsenic, ostensibly for the purpose of poisoning rats and a dog owned by a neighbor. A part of the arsenic was thus used, and the residue was placed by appellant in a bottle containing some kind of liquid, which she deposited in a closet. August 25, 1898, appellant prepared a tumbler of broken ice and water for her daughter-in-law, put a spoon in it, and placed it within her reach. Belle Shenkenberger ate some of the ice, and drank a portion of the water. Afterwards, discovering a white powder in the glass, she called the attention of her mother, Mrs. Mahala Sheridan, to the powder,

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and the latter poured the remainder of the contents of the tumbler into a bottle. On the same day, Belle Shenkenberger was removed from appellant's house to the residence of a sister, in the same town, and two days afterwards she died. The symptoms of the deceased, and the character of her sufferings indicated arsenical poisoning. The appearance of the body, upon a post-mortem examination, confirmed the accuracy of those indications. An analysis of the stomach and its contents revealed the presence of about seventeen grains of arsenic. An analysis of the water poured from the tumbler into the bottle, at the time the deceased called attention to the white powder in the glass, resulted in the discovery of about seven grains of arsenic. The dying declarations of the deceased were: "I know that my mother-in-law poisoned me. That is the way I meet my death." And, "To be poisoned by my mother-in-law;" the preceding part of the latter sentence having been stricken out by the court.

The appellant offered herself as a witness, and was examined. She denied the charge against her, and gave a full and circumstantial account of her relations to her daughter-in-law, and her conduct toward her.

It was insisted, on behalf of the appellant, that there was no proof of ill feeling between her and the deceased; that they had lived together peaceably; that appellant had no motive for the crime of which she was accused; and that there was no proof connecting the appellant with the death of her daughter-in-law. On the other hand counsel for the State contended that the appellant and her husband were in straightened circumstances, and unable without great inconvenience to support the deceased and her child; that the appellant disliked the deceased and had made threats against her; that she wished to get rid of the burden of keeping, nursing, and maintaining her; and that the direct and circumstantial evidence in the case was conclusive of the guilt of the appellant.

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No question is made here as to the sufficiency of the evidence to sustain the verdict. We have examined it, however, with the utmost care, and are of the opinion that it fully justified the jury in finding the appellant guilty as charged in the indictment.

The exclusion of evidence offered by appellant is complained of as error; but, under the well settled rules of appellate procedure, the appellant is not in a position to present these rulings of the trial court for review. In each instance, the bill of exceptions shows that counsel for appellant propounded a question to the witness on the stand; that the State objected; that the court sustained the objection to the question; and that appellant, by her counsel, excepted to the ruling of the court. After this adverse ruling, and the exception to it, the offer to make the proof in response to the question followed; the offer was refused, and there was an exception by the appellant.

In *Deal v. State*, 140 Ind. 354, 371, and *Gunder v. Tibbits*, 153 Ind. 591, 607, 608, it was held that such procedure does not raise any question as to the admissibility of the proposed testimony.

In *Gunder v. Tibbits*, *supra*, p. 608, the reason why no question is raised is thus stated: "The exception to the ruling in sustaining the objection to the question presents no question, because no offer to prove by the answer to the *pending* question was made; the exception affirmed that the court had then and there, by its ruling in sustaining the objection, committed an error; no subsequent action of appellants could make the ruling erroneous if it was not so at the time; now, when the question was no longer pending, the subsequent offer to prove amounted to nothing; an exception can be reserved only to the action of the court in refusing to allow a witness, duly sworn and present, to answer a question. * * * It has been repeatedly decided that the only proper practice is to propound the question to the witness on the stand, and, if objection to

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the question is made, to state to the court what the examiner proposes to prove by the witness's answer to the question, and then, if the objection is sustained, to reserve an exception to the ruling on the question. *Judy v. Citizen*, 101 Ind. 18; *Higham v. Vanosdol*, 101 Ind. 160; *Gipe v. Cummins*, 116 Ind. 511; *Spence v. Board, etc.*, 117 Ind. 573; *Kern v. Bridwell*, 119 Ind. 226; *LaPlante v. State*, 152 Ind. 80; *Sauntman v. Maxwell, ante*, 114; *Chicago, etc., Co. v. DeBaun*, 2 Ind. App. 281; *First Nat. Bank v. Stanley*, 4 Ind. App. 213." See, also, *Whitney v. State, ante*, 573.

Counsel for appellant next insist that the court erred in admitting in evidence the dying declaration of Belle Shenkenberger, as testified to by H. C. Sheridan. The evidence given by said witness, and appellant's objection thereto, as shown by the record, are as follows: "Q. You may state what she [Belle Shenkenberger] said, now, about the cause of her death? Defendant, by her counsel, objected to the question, for the reason that it is a statement made in the absence of the defendant; that it is merged in the written declaration; that the written statement is the best evidence, if there is one. The court overruled the objection, to which ruling of the court defendant, by her counsel, at the time excepted, and the witness answered. A. She said, 'I know that my mother-in-law poisoned me. That is the way I meet my death.' Q. Did she say anything about it being a strange death to die? A. Yes, sir, she gave the expression, 'This was a strange death to die.' On motion of defendant, this answer was stricken out. Q. What was the remainder of that? A. To be poisoned by her mother-in-law. Defendant, by her counsel, moved to strike the last answer from the record, for the reason that it is the expression of an opinion or conclusion. The court overruled the motion, to which ruling of the court defendant, by her counsel, at the time excepted."

To render a dying declaration admissible, it is not neces-

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sary that it be made in the presence of the defendant. It may be, and generally is, made in his absence. There was no evidence or admission that the declaration testified to by the said witness was reduced to writing. It is evident that the objection to the first question propounded was properly overruled.

It is argued by counsel in their brief that the dying declaration, proved by the answer of the witness to the first question, was the expression of an opinion or conclusion, and not the statement of a fact. No such objection, however, was made to said testimony in the trial court, and it cannot be made here for the first time. Were the question properly before us, we would feel constrained to decide that the statement, "I know that my mother-in-law poisoned me. That is the way I meet my death," was, in form at least, the statement of a fact.

Appellant, by her counsel, moved to strike from the answer to the second question, the words "To be poisoned by her mother-in-law," for the reason that it was the expression of an opinion, or conclusion. The overruling of this motion was properly assigned as a cause for a new trial.

It is true that matters of opinion contained in a dying declaration are not admissible, and that the statement must be such as would have been competent if the declarant were sworn as a witness. *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815; *Boyle v. State*, 97 Ind. 322; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218; Wharton's Crim. Ev., (9th ed.), §294.

The difficulty is not in determining the rule, but in its application.

In *Boyle v. State*, 97 Ind. 322, and *Boyle v. State*, 105 Ind. 469, the declarant, answering the question, "What reason, if any, had the man for shooting you?"—said: "Not any that I know of; he said he would shoot my damned heart out." It was held that this answer was not the expression of an opinion.

In *Brotherton v. People*, 75 N. Y. 159, the deceased at

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first did not recognize the person who was disguised, but said: "When he [the latter] drew his pistol, and commenced his pranks, he knew it was the prisoner." Held not an opinion, and admissible.

In *Wroe v. State*, 20 Ohio St. 460, the declarant, in speaking of the fatal wound, said: "It was done without any provocation on his part." The court held that the same was not an expression of an opinion, saying: "Whether there was provocation or not, is a fact, not stated, it is true, in the most elementary form of which it is susceptible, but sufficiently so to be admissible as evidence."

The statement of the deceased in *People v. Abbott*, 4 West Coast Rep. 132, was that the man cut him with a knife, and he had no cause for it whatever; and it was held the statement of a fact.

The statement of the dying person in *State v. Nettlebush*, 20 Iowa 257, was in answer to a question whether the shot was accidental or intentional, and the answer was that it was intentional. The evidence was held competent.

In *Payne v. State*, 61 Miss. 161, it was held that the statement of the deceased, that the defendant shot him without cause, was not the expression of an opinion.

In *Fuller v. State* (Ala.), 23 South. 688, the dying declaration was: "Mr Fuller cut him to death for nothing; that he went to loose the mule, and Fuller came up, and cut him in the neck; that his knife was never open, and that he did not cut Fuller's hat." Held admissible.

It was held in *State v. Reed*, 137 Mo. 125, 38 S. W. 574, that a dying declaration, that the deceased was not armed at the time he was shot by the accused, was admissible.

In *Sullivan v. State*, 102 Ala. 135, 15 South. 264, the declaration, "He cut me for nothing, I never did anything to him," was admitted.

In *Jordan v. State*, 81 Ala. 20, 1 South. 577, the words were: "Jule shot me, and Handy cut me all for nothing," and were held to be competent as facts.

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In *Walker v. State*, 39 Ark. 221, the declaration was: "Nick Walker shot me." It was proved that the declarant was shot through an auger hole at night. The evidence was held to be competent, and that it was to be dealt with by the jury.

In *State v. Clemons*, 51 Iowa, 274, 1 N. W. 546, the declaration was: "Ed. Clemons shot me; aint that right?" Held competent, the court saying that the testimony is to be excluded "only when the dying declaration shows upon its face that it is a mere opinion;" and that it is for the jury to say, on the whole evidence, if the deceased intended to state a fact.

In *State v. Saunders*, 14 Ore. 300, 12 Pac. 441, the declaration was: "He shot me down like a dog", and it was held competent.

In *White v. State*, 100 Ga. 659, 28 S. E. 423, it was decided that the declaration, "He shot me down like a dog", was admissible.

In *Richards v. State*, 82 Wis. 172, 51 N. W. 652, a declaration that the declarant was stabbed without provocation was held competent.

In *Roberts v. State*, 5 Tex. Ct. App. 141, the statement was: "Sam Roberts killed me for nothing." Held the statement of a fact and not an opinion, and admissible.

In *State v. Arnold*, 13 Ired. 184, the declaration was: "A. B. has shot me, or killed me, and none other." The court said that it must be presumed that the declarant intended to state a fact, and not an opinion; that it did not appear that deceased knew, or could know, the facts, seems to go to the credit, and not to the competency of the declarations. As they purport in themselves to disclose the facts, the court was bound to submit them to the jury.

In *State v. Gile*, 8 Wash. 12, 35 Pac. 417, the declaration, "they butchered me", was held admissible as the statement of a fact.

In *State v. Mace*, 118 N. C. 1244, 24 S. E. 798, the declaration, "He murdered me", was held admissible.

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In *Lipscomb v. State*, 75 Miss. 559, 23 South. 210, the declaration, "Dr. Lipscomb has killed me; has poisoned me with a capsule he gave me to-night", was held to be the statement of a fact, and not an opinion, and therefore competent testimony. Whitfield, J., speaking for the court as to the admissibility of the dying declaration, said: "Any process of reasoning which seeks to distinguish between the statement, 'Dr. Lipscomb poisoned me with a capsule he gave me to-night' and 'Dr. Lipscomb killed or shot me' seemed to be a refinement not only too uncertain and visionary to serve in the practical administration of justice, but essentially inaccurate."

The expression, "To be poisoned by my mother-in-law", is a mere repetition of the first part of the declaration. "My mother-in-law poisoned me", and is, in effect, the same. Such expression is no more the statement of an opinion than are the declarations, "He shot me", "He murdered me", "He butchered me", "He cut me", which have been held admissible in many cases. The court, therefore, did not err in overruling the motion to strike the last answer of the witness from the record.

It is also insisted that the court erred in permitting the witness, Elmer E. Sheridan, who was also present when said dying declaration was made, to give the same in evidence. Said witness testified that the declarant said she had been poisoned by her mother-in-law. The record does not show that any objection was made to the introduction of this evidence, or that any motion was made to strike it out. No question concerning the admissibility of said evidence, therefore, is presented for our consideration.

It is next contended that the court erred in refusing to give to the jury instruction numbered *three* requested by appellant. This instruction, after stating certain matters which the jury should take into consideration in determining the weight of the dying declaration given in evidence by the State, concluded as follows: "So I instruct you that this

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class of evidence is not so satisfactory as the evidence of the witnesses upon the stand, and it should, therefore, be carefully scrutinized."

In *Doles v. State*, 97 Ind. 555, the court instructed the jury that dying declarations should be weighed by the ordinary rule governing the admission of other evidence. Counsel for the defendant urged that the court should have said that "such declarations should be cautiously received and carefully scrutinized." In overruling the objection to the instruction, as given, this court said: "The caution and care with which dying declarations should be received and scrutinized seem to us to be questions for the court upon preliminary proof; but when they are received and admitted, their credibility and weight are the principal questions for the jury." See, also, *Dubose v. State*, 120 Ala. 300, 25 South. 185.

It is a well established rule in this State that an instruction containing language which casts suspicion upon, or disparages, or discredits, any class of evidence is erroneous. *Sater v. State*, 56 Ind. 378; *Line v. State*, 51 Ind. 172; *Lewis v. Christie*, 99 Ind. 377, 381, 383; *Finch v. Bergins*, 89 Ind. 360; *Davis v. Hardy*, 76 Ind. 272; *Garfield v. State*, 74 Ind. 60. The said *third* instruction clearly violated this rule, and the court, therefore, did not err in refusing to give the same to the jury.

The *sixth* instruction requested by the appellant was as follows: "Where a criminal cause is tried by a jury, the law contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had.

"Each juror must be satisfied, beyond a reasonable doubt of the defendant's guilt, before he can, under his oath, consent to a verdict of guilty.

"Each juror should feel the responsibility resting upon him as a member of the body, and should realize that his own mind must be convinced, beyond a reasonable doubt, of the defendant's guilt, before he can consent to a verdict of guilty.

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"If any one of the jury, after having duly considered all of the evidence, and after having consulted with his fellow jurymen, entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty." The court refused to give the instruction, and such refusal was assigned as one of the reasons for a new trial.

It is said on behalf of the appellant that an instruction substantially like this received the sanction of this court in *Castle v. State*, 75 Ind. 146, and that the cases of *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369, *Stitz v. State*, 104 Ind. 359, and *Parker v. State*, 136 Ind. 284, sustain the claim of the appellant that the instruction should have been given.

The instruction refused combines a part of the charge held proper in *Castle v. State*, *supra*, with a portion of the reasoning of the court in that case. In *Castle v. State*, *supra*, the appellant complained that none of the charges given by the court embodied the idea that each juror must be satisfied, by the evidence, of the guilt of the defendant, before a conviction could be had. The court sustained that view, and decided that the proposition contained in the instruction asked for, viz., that "if any one of the jury, after having duly considered all of the evidence, and after having consulted with his fellow jurymen, entertains such reasonable doubt, the jury cannot in such case find the defendant guilty", was correct in point of law.

In *Clem v. State*, 42 Ind. 420, the trial court had advised the jury that "no number of minds can agree upon a multitude of facts, such as this case presents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinions of others, without what some might call compromise of different views. No man who is unwilling to do this within reasonable limits, and without a sacrifice of conscience, ought to have place in the jury box, or be a member of any deliberative body." In disapproving this instruction, the court said: "Each juror must act upon

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his own judgment of the facts as they are presented to him, in the evidence adduced, and cannot rightfully yield his honest convictions to those of some one else, or even to those of all the other members of the jury. * * * It is the duty of jurors to consider carefully every part of the evidence, and, if necessary, reconsider it, and to hear and consider the views and arguments of their fellow jurors, but at last each one of them must act upon his own judgment, and not upon that of another."

In *Stitz v. State*, 104 Ind. 359, it is said: "There can be no conviction of a crime unless all the jurors are satisfied beyond a reasonable doubt of the guilt of the accused."

In *Parker v. State*, 136 Ind. 284, the law is thus stated: "We think the court also erred in refusing to instruct the jury, as prayed by the appellants, that so long as any juror entertained a reasonable doubt of their guilt, they could not be convicted. The jurors should have been instructed as to their individual responsibility."

The rule to be deduced from the decisions is that in a criminal case the defendant is entitled to the benefit of an instruction, to the effect that *each* juror must be satisfied by the evidence of the guilt of the defendant beyond a reasonable doubt, before he can consent to a verdict of guilty.

A glance at the instruction tendered by the appellant shows that this idea, or proposition, is three times repeated in slightly varying language. Such needless repetitions are calculated to make erroneous impressions upon the minds of the jurors, and are universally condemned. They may serve to render a charge more striking or persuasive, but their result is the undue emphasis of the proposition so reiterated.

It is well settled that, when a legal proposition has been once clearly stated, it is not error to refuse to repeat it in different phraseology. The form of expression in a special instruction proposed by counsel may be much more forcible and impressive than that adopted by the court; but, it does

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not follow that such form is to be preferred, or that it states the law more correctly. When a special instruction is presented, the material point is the idea embodied in it, and not the language used to express that idea. In every case, the court has the right to choose its own mode of expression, and to clothe its ideas in such words as it deems suitable.

In the special instruction under examination, the single legal proposition is that each juror must be satisfied of the guilt of the defendant beyond a reasonable doubt, before he can consent to a verdict of conviction. This is a correct statement of the law. The only inquiry then is, whether this proposition was, or was not, contained in the charge as given. The court used this language: "I instruct you that if from all the evidence in the case, *you, each*, believe, as jurors, beyond a reasonable doubt, that the defendant committed the acts of which she is accused, in manner and form as charged in the indictment," etc. In our opinion, this instruction sufficiently advised the jury as to their individual responsibility, and that *each* of them must be so convinced before he could consent to a verdict of conviction. No complaint is made that the jury, as a body, were not fully and properly instructed that they must be satisfied by the evidence of the guilt of the defendant beyond a reasonable doubt, before they could convict her. This admonition was repeated throughout the charge, and in connection with every aspect of the case. The objection taken to the decision of the court, in refusing to give the special instruction asked for, is that the idea of the individual responsibility of the jurors was not made prominent enough. In this view, we cannot concur. In our opinion, the language employed by the court was better adapted to convey to the jurors an adequate idea of their duty than that proposed by appellant. The latter was calculated to create an impression that the court, itself, entertained doubts as to the guilt of the prisoner, and feared the collective opinion of the jury. It might easily have been understood as an intimation to one or more

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of the jurors to withhold his, or their, assent from a verdict of guilty.

The instruction asked for informed the jury that, if *any one* of them entertained a reasonable doubt upon the evidence, "the jury, in such case, *cannot find the defendant guilty.*" The sentence quoted is, to say the least, an inaccurate and misleading statement of the law. In connection with an instruction as to the effect of the existence of a reasonable doubt in the mind of one or more of the jurors, the proper charge is that the juror, or jurors, entertaining such doubt, *cannot consent to a verdict of guilty.* The result, under such circumstances, is a disagreement of the jury, and nothing more. Thompson Charging the Jury, pp. 118, 120, 121; *State v. Hamilton*, 57 Iowa 596, 11 N. W. 5; Thompson on Trials, §§2325-2331; *Wachstetter v. State*, 99 Ind. 290, 50 Am. Rep. 94; *Goodwin v. State*, 96 Ind. 550; *Campbell v. People*, 109 Ill. 565; *Haney v. Caldwell*, 43 Ark. 184; *Sadler v. Sadler*, 16 Ark. 628; *Hanger v. Evins*, 38 Ark. 334; *Merritt v. Merritt*, 20 Ill. 65, 80; *Roe v. Taylor*, 45 Ill. 485; *Dunn v. People*, 109 Ill. 635; *Hamilton v. People*, 29 Mich. 173; *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *Gardiner v. State*, 14 Mo. 97; *State v. Roberts*, 15 Ore. 187, 13 Pac. 896; 11 Ency. Pl. & Pr., pp. 288, 299, and notes.

The appellant next claims that the court erred in permitting the jury to separate at its adjournments during the trial, and that she was prejudiced thereby. In the absence of anything in the record showing the contrary, she must be presumed to have consented to such separation. No objection to such proceeding of the court was made by appellant, and consequently the question is not before us.

In the last place, a reversal is demanded on account of the alleged misconduct of counsel for the State in the closing argument.

The statements objected to were promptly withdrawn by the court from the consideration of the jury. No motion

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to set aside the submission, and to discharge the jury, was made, but, upon such withdrawal, the appellant permitted the matter to drop. This course having been pursued, no available error appears in the record. *Blume v. State*, ante, 343; *Dehler v. State*, 22 Ind. App. 383.

Judgment affirmed.

THE STATE, EX REL. SNYDER, v. BURKE.

[No. 19,089. Filed May 29, 1900.]

OFFICERS.—Township Assessor.—Vacancy.—Appointment.—Election of Successor.—Under the provision of §8508 Burns 1894, that township assessors elected or appointed shall continue in office until the next township election, and until their successors are elected and qualified, one appointed as assessor in August, 1898, to fill a vacancy caused by death was entitled to hold the office, by virtue of the act of 1897 (Acts 1897, p. 64), changing the time of holding the election of township trustees and assessors from November, 1898, to the general election in November, 1900, until his successor was elected and qualified in November, 1900.

From the Perry Circuit Court. *Affirmed.*

J. W. Brady, J. W. Ewing and S. H. Esarey, for appellant.

M. D. Casper and E. C. Henning, for appellee.

HADLEY, J.—At the November election, 1894, Jacob Davis was elected assessor for a township in Perry county, and duly qualified and entered upon the duties of the office. On July 31, 1898, Davis died. The county auditor appointed William Burke (appellee) to fill the vacancy caused by the death of Davis, and he qualified and entered upon the duties of the office on the 2nd day of August, 1898. At the general November election, 1898, the relator was a candidate for said office, and received all the votes cast for the same, and afterwards, under said election, duly qualified to act as such assessor, and demanded of appellee, Burke, a surrender of said office, which was refused. Appellant

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thereupon brought *quo warranto*, setting forth in his petition the foregoing facts, to which a demurrer was sustained for insufficiency. The sustaining of the demurrer to the petition is the only error assigned.

The real questions involved may be thus stated: (1) Does an appointee to fill a vacancy in the office of township assessor, caused by the death of the incumbent in July, 1898, hold office until a successor is duly elected and qualified? (2) Could a township assessor be legally elected at the November election, 1898?

The first question must be answered in the affirmative under §8508 Burns 1894, which reads as follows: "And if from any other cause a vacancy should occur in said office in any township at any time, the county auditor shall fill such vacancy by appointment, and the person so appointed shall qualify as herein required. All township assessors last elected or appointed shall continue in office until the next township election, and until their successors are elected and qualified under this act."

The language of this statute must be held to relate to the next ensuing township election at which township assessors may be lawfully elected. By an act approved February 25, 1897 (Acts 1897 p. 64), it is provided that "the time of holding the election of township trustees and assessors shall be changed from the general election on the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and at the general election on the first Tuesday after the first Monday in November of every fourth year thereafter. Said township trustees and assessors shall qualify as now provided by law, and enter upon the discharge of the duties of their respective offices at the expiration of ten days after such election." Section five of said act provides that "All laws and parts of laws in conflict with the provisions of this act are hereby repealed."

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Here is an express provision of the statute that the successors to the assessors in office at the time of the passage of the act in 1897 should not be elected until the November election in 1900, and that the terms of office of such successors should not begin until ten days after such election. Hence it follows that Davis, having been elected in November, 1894, for a term of four years from August 1, 1895, "and until his successor is elected and qualified" (§8508, *supra*), would, had he survived, been entitled to hold the office until his successor was elected and qualified, which could not, under the statute, happen before November, 1900. *Scott v. State*, 151 Ind. 556.

Davis, having died before the expiration of his term, and appellee, Burke, having been legally appointed to the vacancy, Burke is entitled to hold the office until his successor is elected and qualified, which, as we have seen, can not transpire before November, 1900. See *State v. Menaugh*, 151 Ind. 260, 43 L. R. A. 408, 418; *Weaver v. State*, 152 Ind. 479, 483; *State v. Long*, 91 Ind. 351.

We find no error in the record. Judgment affirmed.

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[No. 19,074. Filed May 29, 1900.]

CRIMINAL LAW.—Homicide.—Administering Poison.—Indictment.—

An indictment for murder by administering poison need not allege that the deceased had no knowledge that the substance administered to him by defendant was poison. *p. 649.*

SAME.—Indictment.—Verdict.—Conviction.—Where the second count of an indictment charged defendant with murder in the first degree, and the verdict found him guilty "as charged in the second count of the indictment," the finding was a sufficient conviction of murder in the first degree. *p. 649.*

SAME.—Indictment.—Verdict.—Conviction.—When a verdict finds a defendant guilty in a case where the indictment charges an offense involving minor offenses, and does not specify the particular offense, it will be deemed a finding of guilty of the highest offense charged. *pp. 649, 650.*

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154	647
157	385
157	462

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APPEAL AND ERROR.—Evidence.—Record.—Where the determination of a question on appeal depends upon the evidence, it cannot be considered unless all of the evidence given in the case is contained in the record. *p. 650.*

SAME.—Evidence.—Bill of Exceptions.—A bill of exceptions containing the recital "this is all the oral evidence in the above entitled cause" does not show that it contains all the evidence given in the cause. *p. 650.*

CRIMINAL LAW.—Evidence.—Admissions of Third Persons.—A defendant on trial will not be permitted to show that another person admitted that he committed the crime, and the fact that the person referred to was jointly indicted with defendant for the same offense, and had been tried and convicted, does not change the rule. *pp. 650, 651.*

APPEAL AND ERROR.—Record.—Court Rules.—An assignment in a motion for a new trial that the court erred in refusing to permit defendant to recall a witness to enable him to correct an error in his testimony will not be considered on appeal, where the page and line of the record containing the ruling is not pointed out. *p. 651.*

SAME.—Affidavits.—New Trial.—Record.—Criminal Law.—Unless the affidavits filed in support of a motion for a new trial in a criminal case are made a part of the record by bill of exceptions they cannot be considered on appeal. *p. 651.*

PRACTICE.—Evidence.—Offer to Prove.—Appeal and Error.—No question is presented on the ruling of the court in excluding the answer to a question propounded to a witness, where the offer to prove was not made until after the objection to the question was sustained and an exception reserved. *pp. 651, 652.*

From the Daviess Circuit Court. *Affirmed.*

V. R. Greene, T. H. Dillon, J. H. Spencer and W. D. Curll, for appellant.

W. L. Taylor, Attorney-General, W. E. Cox, Merrill Moores and C. C. Hadley, for State.

MONKS, J.—The indictment was in four counts, each charging the appellant and John Cline with murder in the first degree, by administering poison to one Franklin P. Smith. He was found guilty, as charged in the second count of the indictment, and his punishment assessed at imprisonment for life, and, over a motion for a new trial, judgment was rendered upon the verdict.

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The errors assigned call in question the action of the court in overruling appellant's motion to quash the second count of the indictment, and appellant's motion for a new trial.

The objection to the said count is that it is too uncertain, vague, and indefinite to charge a public offense, in that it does not charge that "Smith, the deceased, was ignorant of what he received, nor that he did not receive it voluntarily, nor that he did not voluntarily swallow it." It was not necessary to the sufficiency of said count to allege that the deceased had no knowledge that the substance administered to him by appellant was poison. Said second count is substantially a copy of the indictment, which was sustained in *Snyder v. State*, 59 Ind. 105. See also Gillett's Crim. Law, (2nd ed.), p. 418; *Epps v. State*, 102 Ind. 539, 542; *Bechtelheimer v. State*, 54 Ind. 128. Said count charges appellant with the murder of Franklin P. Smith, by administering poison, and is sufficient under §1977 Burns 1894, §1904 R. S. 1881 and Horner 1897, and the court did not err in overruling the motion to quash said count.

Appellant insists that the verdict is insufficient for the reason that it does not state the degree of murder of which he is found guilty. The second count of the indictment charged appellant with murder in the first degree, and the verdict found him guilty "as charged in the second count of the indictment." The verdict, therefore, found appellant guilty of murder in the first degree, because that was the crime charged. *Kennedy v. State*, 6 Ind. 485, 486; *Frolich v. State*, 11 Ind. 213.

Moreover, it is settled law in this State that when a verdict finds a defendant guilty in a case where the indictment charges an offense involving minor ones, and does not specify the particular offense, it will be deemed a finding of guilty of the highest offense charged. *Rose v. State*, 82 Ind. 344, 345, and cases cited. It follows that, even if the verdict had found the appellant guilty, omitting the words "as

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charged in the second count of the indictment," and assessed his punishment at imprisonment for life, the same would be deemed a finding of guilty of murder in the first degree, because that was the highest offense charged in said count.

Appellant, by his counsel, argues that the verdict is contrary to the evidence. It is manifest that the determination of this question depends upon the evidence, and cannot be considered unless all the evidence given in the cause is contained in the record. *Guenther v. State*, 141 Ind. 593, 595, and cases cited. It is recited in the bill of exceptions that "this is all the oral evidence in the above entitled cause." As there may have been other evidence than oral evidence given in said cause, the bill of exceptions does not show that it contains all the evidence given in said cause. Gillett's Crim. Law, §998; Ewbank's Manual, §30, p. 39. Therefore, this court cannot consider or pass upon the question, whether or not the verdict is contrary to the evidence. *Guenther v. State*, *supra*, p. 595; *Royse v. Bourne*, 149 Ind. 187, 191.

During the trial and at the proper time appellant offered to prove by a competent witness that within six hours after the death of Franklin P. Smith, one John Cline said to the witness, in talking about the death of said Smith: "I am the man who gave him the dose that turned up his toes, I always carry it right in here;" and as he spoke he pointed to an inside vest pocket. The evidence was excluded, and said action of the court is specified as a cause for a new trial. It is settled beyond controversy that a defendant on trial cannot be permitted to show that a third person has admitted that he committed the crime. 14 Am. Dig., (Cent. ed.) Col. 1647. 1648, §981; Gillett's Col. & Ind. Ev. §227, and case cited in note 2; Wharton's Crim. Ev. (9th ed.) §225 on p. 176; *Bonsall v. State*, 35 Ind. 460; *Jones v. State*, 64 Ind. 473, 484, 485; *Smith v. State*, 9 Ala. 990; *Snow v. State*, 58 Ala. 372, 54 Ala. 138; *West v. State*, 76 Ala. 98; *State*

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v. *Evans*, 55 Mo. 460; *Davis v. Commonwealth*, 95 Ky. 19, 23 S. W. 585, 44 Am. St. 201. The fact that the John Cline mentioned was jointly indicted with appellant for said offense, and had been tried and convicted before the trial of this cause, can in no way change the rule. The court did not err, therefore, in refusing to admit said evidence.

It is assigned as a cause for a new trial that the court erred in refusing to permit appellant to recall one Fleming, a witness for appellant, to enable him to correct an error in his testimony. The error in said testimony and the correction desired are fully set forth in the motion for a new trial, and an affidavit of said Fleming in support of said cause for a new trial is copied into the transcript by the clerk. Counsel for appellant have not called our attention to the page and line of the bill of exceptions where it is shown that he asked permission to recall said witness, or that the court made any such ruling as the one complained of. The rules of this court require the party asserting that a ruling of the trial court is erroneous to point out the page and line of the record where the same may be found; and it has been uniformly held by this court that if this rule was not complied with, the court would not search the record to find such ruling, even if erroneous. *State v. Winstandley*, 151 Ind. 495, 501, 502, and cases cited.

Neither have appellant's counsel pointed out the place in the record where the affidavit of said Fleming is contained in a bill of exceptions. In a criminal case, unless affidavits filed in support of a motion for a new trial are made a part of the record by a bill of exceptions, they cannot be considered on appeal, although copied into the transcript by the clerk. *Graybeal v. State*, 145 Ind. 623, and cases cited.

Appellant complains of the exclusion of evidence offered by him, the same being specified as the tenth and eleventh causes for a new trial. The bill of exceptions shows that in each instance appellant's counsel propounded a question to the witness to which the State objected; and the court

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sustained the objection to which the appellant excepted. Then followed an offer to prove, refusal of the offer, and an exception by appellant. It is established in this State that such procedure raises no question as to the admissibility of the proposed testimony. The reason therefor is fully stated in *Gunder v. Tibbits*, 153 Ind. 591, 607, 608. See also *Deal v. State*, 140 Ind. 354, 371; *Whitney v. State*, ante, 573.

Newly discovered evidence is assigned as a cause for a new trial, but as the affidavits filed in support thereof are not made a part of the record by a bill of exceptions, there is nothing in the record to sustain said cause for a new trial. *Graybeal v. State*, 145 Ind. 623.

Finding no available error in the record the judgment is affirmed.

MCKEE ET AL. v. TOWN OF PENDLETON ET AL.

[No. 19,181. Filed May 29, 1900.]

MUNICIPAL CORPORATIONS.—*Street Improvements*.—*Assessment of Costs*.—*Front-Foot Rule*.—*Injunction*.—A street improvement proceeding whereby it is proposed to assess the total costs of the improvement to the abutting property according to the front-foot rule, regardless of the special benefits accruing from the improvement, and largely in excess thereof in some instances, is not authorized by any statute in force in this State, and may be enjoined by any person affected by the improvement.

From the Madison Circuit Court. *Reversed*.

W. A. Kittinger, E. D. Reardon and W. S. Diven, for appellants.

E. B. Goodykoontz, G. M. Ballard and B. H. Campbell, for appellees.

HADLEY, J.—This is an action to enjoin the trustees of the town of Pendleton from entering into a contract for the improvement of a street known as North Pendleton avenue.

154	652
155	408
155	407

154	652
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154	652
158	428

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It is averred, in substance, in the complaint that on the 9th day of February, 1899, the board of trustees passed a declaratory resolution for the improvement of North Pendleton avenue from the bridge across Fall creek to the north line of the C. C. C. & St. L. railroad and the sidewalks along said street between said points according to plans and specifications on file with the town clerk; that said board of trustees proposes to improve said street by grading and paving with brick the full width of the roadway, and by grading and paving with cement the sidewalks, and by placing a stone curb along the outer line of the sidewalks; that the trustees intend to, and will, contract for said improvement, if not enjoined, at a cost of \$3.50 per lineal foot of the entire length of said street on each side thereof, and propose to pay for said improvement by adding to the total cost of the improvement the other expenses of the proceedings, and dividing the total thus obtained by the whole number of lineal feet on each side of said street, and by multiplying, by the result thus obtained, the number of lineal feet in each lot and parcel abutting on said street—the sum so arrived at to be the cost to each lot and tract bordering on said street, the town paying for the street and alley crossings in the same proportions; that the cost of said improvement will be thus apportioned without any reference to accruing benefits to the several lots and lands abutting on said street, and without taking into consideration any other fact than the total cost of said improvement and the equal distribution thereof to each front foot irrespective of benefits; that the special benefits resulting from the proposed improvement will not exceed \$1.50 per lineal front foot on the average of all, and will not benefit the lots and lands owned by the plaintiffs, and each of them, more than one-half the sum proposed to be assessed against them as above set forth; that it will not benefit the lot owned by the plaintiff, Mary C. Brown, in any sum whatever; that it will not benefit the lot owned by the plaintiff, W. C.

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Bryant, to exceed fifty cents per foot; that the total special benefits to all the bordering lots and lands will not exceed one-half the total cost of said improvement; that the cost to 597 feet of unimproved land adjoining the bank of Fall creek will be more than the entire value of said land after the completion of said improvement; that the actual special benefits resulting from said proposed improvement will be unequal, and three times greater to certain abutting lots described than to others described.

Appellees' demurrer to the complaint was sustained, and, appellants refusing to plead further, judgment was rendered against them from which this appeal is prosecuted. The action of the court in sustaining the demurrer to the complaint is called in question. Appellees have filed no brief. It is nowhere alleged in the complaint that appellees intend to accomplish the proposed improvement under the provision of the statute commonly known as the Barrett law. It is alleged that the town intends to, and will, if not enjoined, contract for the improvement at a sum largely in excess of the total special benefits accruing therefrom to the abutting property, and proposes to, and will, assess the total cost equally to each front foot irrespective of the question of benefits accruing from the improvement; that the actual benefits to the several lots and lands bordering on the street will be unequal; that to some lots there will result no benefit; that to others the actual benefits will be three times greater than the average benefit to the whole line of lots and lands.

Appellees' demurrer admits these averments to be true. If true, appellees intend to exercise a power not conferred by any statute in force in this State (*Adams v. City of Shelbyville*, ante, 467), and are liable to be enjoined by any person affected. *City of Fort Wayne v. Shoaff*, 106 Ind. 66; *Town of Hardinsburg v. Cravens*, 148 Ind. 1; *City of Terre Haute v. Evansville, etc., R. Co.*, 149 Ind. 174, 37 L. R. A. 189; *Adams v. City of Shelbyville*, ante, 467.

The complaint is sufficient to put the town upon its answer

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as to its intent. Judgment reversed with instructions to overrule the demurrer to the complaint.

Baker, C. J., concurs in the result.

CONCURRING OPINION.

BAKER, C. J.—I think that on the facts stated in the complaint appellants are entitled to an injunction, (1) because the acts done and threatened by appellees are the acts provided for in the Barrett law which I find to be unconstitutional; and (2) because the averments in reference to the town's being in debt beyond the constitutional limit and having no cash nor unpledged revenues, show that appellants as general taxpayers are entitled to have the town and its officers enjoined from entering into a contract for improvements, of which the cost for street and alley crossings (and, as the majority hold, an indefinite sum beyond) would be a liability against the town.

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[No. 19,205. Filed May 29, 1900.]

CRIMINAL LAW.—*Indictment.*—*Homicide.*—An indictment charging defendant with killing his wife by wounding her with a revolver loaded with gunpowder and leaden ball, which revolver he "then and there held in his hands, and discharged at, against, and into the person" of the deceased, is sufficiently certain to show that the revolver was fired, and not thrown as a missile from the hand of defendant. pp. 656, 657.

SAME.—*Evidence.*—*Declarations of Deceased.*—*Res Gestae.*—*Homicide.*—In a trial for murder, evidence that when the shot was fired deceased staggered back about five feet, dropped the baby she was holding in her arms, sank upon her knees and exclaimed that her husband had shot her, was admissible as part of the *res gestae*. pp. 657, 658.

SAME.—*Evidence.*—*Dying Declarations.*—Proof that declarant was under the sense of speedy and certain death may be afforded by circumstances, even in the absence of any direct statement to that effect by the declarant. p. 658.

SAME.—*Evidence.*—*Dying Declarations.*—Where the court in a murder trial admitted in evidence the dying declaration of the deceased

154	655
155	844
154	655
157	208
157	385
157	386
154	655
165	420
154	655
168	91

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that her husband shot her. the declarant's statement that she was mortally wounded and must die was admissible in order that the jury might know all of the surrounding circumstances so as to determine what credit should be given to the declaration. *pp. 658, 659.*

CRIMINAL LAW.—Evidence.—Dying Declarations.—Impeachment.—Where in a prosecution for murder the State introduced in evidence the dying declaration of deceased that defendant shot her, the defendant was entitled to prove that deceased made statements, during the two weeks she languished from the wound, contradictory to the dying declaration proved by the State, as an impeachment of the dying declaration. *pp. 659, 660.*

SAME.—Evidence.—Admission of Guilt by Another.—Evidence in a murder trial tending to prove that a person other than defendant, subsequent to the homicide, admitted her guilt was not admissible. *pp. 660, 661.*

SAME.—Evidence.—Dying Declarations.—Impeachment.—Where in a murder trial the State introduced in evidence the dying declaration of deceased, that defendant, her husband, shot her, and showed that the shot was fired from a small caliber revolver, that the assassin had on a man's attire, including a long overcoat, and spoke in an assumed voice that sounded as much like a woman's as a man's, and defendant introduced another dying declaration of the deceased that a certain named woman was the assassin, the defense was entitled to prove that such woman a few days before the murder took a small caliber revolver to a gunsmith to be repaired, and got the revolver on the day of the murder, and that on the evening of the murder she left her house, disguised as a man, with a man's overcoat on, and went in the direction of the house of deceased. *pp. 660-664.*

EVIDENCE. — Phases of the Moon. — Quantity of Light. — Expert Testimony.—It was proper in a murder trial to show the phase of the moon and the condition of the atmosphere on the night of the tragedy, but the opinion of an expert witness as to the quantity and quality of the light was inadmissible. *p. 664.*

From the Clark Circuit Court. *Reversed.*

L. A. Douglass and H. W. Phipps, for appellant.

H. C. Montgomery and B. Traylor, for State.

BAKER, C. J.—Appellant was convicted of murdering his wife. He complains of the overruling of his motion to quash the indictment, and of the refusal to grant him a new trial.

It is urged that the indictment fails to show, with sufficient certainty, the means by which the mortal wound was

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inflicted. The indictment avers that appellant killed Lizzie Green by wounding her "with a certain dangerous and deadly weapon, to wit, a revolver then and there loaded with gunpowder and leaden ball, which revolver he, the said George Green, then and there had in his hands and discharged at, against and into the person of the said Lizzie Green," thereby inflicting a mortal wound of which she died. The uncertainty is said to arise over the question whether the deceased was struck with the revolver or the leaden ball with which the revolver was loaded. Appellant relies upon the case of *Littell v. State*, 133 Ind. 577. The indictments are not exactly parallel; but, if they were, the method of criticism employed in *Littell's* case is too fanciful and strained to be accepted as a precedent. Compare *Keyes v. State*, 122 Ind. 527, and *Bass v. State*, 136 Ind. 165. To discharge a loaded revolver does not mean to throw the revolver as a missile from the hand, but to free the revolver of the missile with which it is loaded, by firing.

Moran, father of deceased, testified that between 8 and 9 o'clock in the evening he was at his daughter's house with her and her infant children; that some one outside called "O, Mis' Lizzie Green, come out, I want to see you;" that his daughter with a babe in her arms stepped to the door and asked "who are you;" that the person shot, and witness heard the sound of retreating footsteps. Question. "Now what did she do when the shot was fired?" Answer. "She halloed 'O Lord—.'" Defendant objected to anything she said, on the ground that it was not part of the *res gestae*. The court overruled the objection, and the defendant excepted. Q. "Now go on, Uncle." A. "She said 'O Lord, George has shot me!'" Motion to strike out, overruled, exception. On cross-examination, the witness said that when the shot was fired his daughter staggered back about five feet, dropped the baby on the bed which stood near the door, and sank upon her knees, before making the above exclamation. No motion to strike out was predi-

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cated on the cross-examination. But whether the exclamation was made at the door or by the bed, it was plainly the event speaking through the wounded person and not the wounded person giving an account of a past occurrence. In all cases such as this, it is obvious that the shot has been fired and the principal act is at an end from the standpoint of the assailant, before the assailed can make any declaration. The admission of the declaration depends upon its being so connected in time and circumstances with the principal act that the assailed appears to be the spontaneous spokesman of the act and not the deliberate utterer of an afterthought. *Gillett Ind. & Col. Ev. Ch. IX; Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48; *Jones v. State*, 71 Ind. 66; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566, and cases cited on page 576; *Hall v. State*, 132 Ind. 317; *Parker v. State*, 136 Ind. 284; *Shoecraft v. State*, 137 Ind. 433.

A dying declaration in which Mrs. Green stated that appellant was the person who shot her was admitted in evidence over appellant's objection. It is contended that the proof was not clear that the declarant was under the sense of certain and speedy death. Such proof is necessary, but it may be afforded by circumstances, even in the absence of any express statement to that effect by the declarant. *Gillett Ind. & Col. Ev. §§195-197*. The declaration in question was made the night before Mrs. Green died. The witness testified that the declarant said she knew she could not live long; and that declarant seemed to be very weak and "had to stop between her talk." The declaration was reduced to writing and signed. It contained these statements: "I realize that I must die—that I am mortally wounded. * * * I say, as I am about to die, that George Green shot me." All of this evidence was first for the court to hear in determining the admissibility of the declaration; it was competent; it was uncontradicted; and its sufficiency was such as to satisfy the court that the declaration should be admitted. No error appears in the ruling. *Gillett Ind.*

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& Col. Ev. §202. Appellant also urges that the court should have excluded from the jury the declarant's statement as to her sense of her impending death. After the court had decided that the declaration as to the slaying and the slayer was admissible, the jurors were entitled to know all of the circumstances surrounding the declarant in order to determine what credit should be given to the declaration. Gillett Ind. & Col. Ev. §203. Appellant further objects to the declaration because it does not fix the date of the tragedy. The occasion was amply identified.

Appellant was permitted to prove a dying declaration in which Mrs. Green stated that Clara Brown was the person who shot her. Appellant offered to prove statements, made by deceased at various times during the two weeks she languished from the wound, that were contradictory to the dying declaration proved by the State, and to the effect that the fatal shot was fired by Clara Brown. The State objected because the preliminary proof showed that the offered statements were neither part of the *res gestae* nor dying declarations. Appellant was entitled to this evidence as an impeachment of the dying declaration introduced by the State. Gillett Ind. & Col. Ev. §204; *People v. Lawrence*, 21 Cal. 368; *State v. Lodge*, 9 Houst. (Del.) 542, 33 Atl. 312; *Morelock v. State*, 90 Tenn. 528, 18 S. W. 258; *Carver v. United States*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602; 10 Am. & Eng. Ency. of Law (2nd ed.), 384. Inasmuch as a defendant has no opportunity at the trial to have a cross-examination as to the subject-matter of the dying declaration, it would be most unjust to deprive him of the right of impeachment by contradictory statements; and the right would be lost to him, if he were required to lay the usual foundation for that kind of impeachment. But the State claims that appellant had the benefit of the contradiction by proving the dying declaration that inculpated Clara Brown. That declaration was primary and direct evidence in favor of appellant, and its admission

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was not at all dependent upon the introduction of the other dying declaration by the State. True, the one dying declaration contradicts the other. But the same is true of much direct evidence of litigants. And the fact that one party has direct evidence that is in conflict with his adversary's does not curtail his right to discredit his adversary's direct evidence by impeachment.

The mortal wound was inflicted with a bullet from a small-caliber revolver. Moran, the deceased's father, testified that he did not recognize the voice of the person who called his daughter to the door; that it did not sound like a man's voice nor like a woman's, but seemed to be feigned. In her dying declaration introduced by the State, Mrs. Green said her assailant had a man's hat pulled down over the eyes and wore a long overcoat. Appellant, after introducing the dying declaration that named Clara Brown as the assassin, offered to prove that Clara Brown a few days before the murder took a small-caliber revolver to a gunsmith to be repaired; that she got the revolver from the smith on the day of the murder; that she asked the smith if the revolver was in perfect repair and would snap a cartridge every time. Appellant offered to prove by a neighbor of Clara Brown that a few days before the murder Clara Brown said to the witness that she was jealous of Charlie Mitchem and Lizzie Green, that she did not intend to have Charlie Mitchem going around with Lizzie Green, that she would kill her, and that the way she would kill her would be to fix herself up to look like a man, go to her house after dark, call her out, and shoot her when she came to the door; that, about 7:15 o'clock on the evening of the murder, witness saw Clara Brown leave her house, disguised as a man, with a man's hat and a man's overcoat on, and go off in the direction of the home of Lizzie Green, which was about a mile from the house of Clara Brown. Appellant further offered to prove by the same witness that on November 20, 1898, the day after the assault, Clara Brown said

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to the witness that the person who shot Lizzie Green did not get her this time, but would the next. The tendency of the last offer is to prove that Clara Brown, subsequent to the shooting, admitted her guilt. Such evidence is not admissible. *Gillett Ind. & Col. Ev.* §227; *Bonsall v. State*, 35 Ind. 460; *Jones v. State*, 64 Ind. 473, 485. The overt acts of Clara Brown, offered to be proved by the gunsmith and the neighbor, were admissible in connection with the evidence already before the jury. The State had shown that the shot was fired from a small-caliber revolver; that the assassin spoke in an assumed voice that sounded as much like a woman's as a man's; and that the assassin had on a man's attire, including a long overcoat. The dying declaration introduced by the defense was direct and primary evidence that Clara Brown was the assassin. In this state of the evidence, appellant was entitled to prove that Clara Brown had had a small-caliber revolver repaired and that it was received into her possession shortly before the murder, and that in the evening of the tragic day she was seen to leave her home, disguised as a man, wearing a man's hat and long overcoat, and go in the direction of Lizzie Green's. What Clara Brown said to the gunsmith in having the revolver repaired was admissible as explanatory of that act. And, although threats of a third party against the deceased are not competent in and of themselves (*Jones v. State*, 64 Ind. 473; *Walker v. State*, 102 Ind. 502), yet, there being evidence pointing directly to Clara Brown as the guilty person, appellant should have been permitted to show that she had a motive and the disposition to commit the crime. *Gillett Ind. & Col. Ev.* §§228, 276, 278; *Underhill Crim. Ev.* §332; *State v. Hawley*, 63 Conn. 47, 27 Atl. 417; *Commonwealth v. Abbott*, 130 Mass. 472; *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 561, 24 L. R. A. 235; *State v. Davis*, 77 N. C. 483; *Murphy v. State*, 36 Tex. Crim. R. 24, 35 S. W. 174; *Worth v. Chicago, etc., R. Co.*, 51 Fed. 171; *Alexander v. United States*, 138 U. S. 353,

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11 Sup. Ct. 350, 35 L. ed. 954; *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 706. In *State v. Hawley*, *supra*, it was said: "In this case the threat was not an isolated, independent transaction. On the contrary it was a link in a chain of circumstances which the counsel for the accused might with propriety claim connected Mrs. Hawley with the crime itself." The court held in *Commonwealth v. Abbott*, *supra*: "It was clearly competent for the defendant to prove that he did not commit the murder, by showing that some other person did; and, as one step towards that end, he had a right to prove such a state of ill feeling on the part of the husband, existing at the time of the homicide, as would furnish him with a motive for the commission of the crime." In Trefethen's case, the defense was that the deceased had committed suicide by drowning. The evidence against the defendant was circumstantial. There was the fact of death by drowning, but no evidence of a struggle or any violence. Held, that the declaration of deceased, made the day before her death, that she intended to drown herself, was admissible. In *Worth v. Chicago, etc., R. Co.*, *supra*, the threats of third parties to do the act for which the defendant was sought to be held liable, were admitted. "The position taken by the defendant on the trial was that the train had been wrecked through the intentional wrong-doing of a third party, and to sustain this defense evidence was introduced tending to show that the train had been derailed by an obstruction in the frog; and to prove that this had been intentionally placed in the frog, evidence showing the position of the obstruction was given, tending to show that it required human agency so to place it, and it was then shown that there had been difficulty between the company and persons employed in repairing the track leading to the discharge of some of the latter, thus creating ill feeling towards the company; that two of the persons discharged had made the threats admitted in evidence shortly before the accident, and that on the evening of the accident

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four persons had been seen on the track close to the place where the train was derailed, who acted suspiciously; and upon these facts, thus linked together, the company rested this defense. If evidence of the other facts in this chain of circumstances was admissible (and the contrary is not contended) no good ground is perceived why the facts of the threats made should alone be excluded. It is the fact that the threats were made that was proved, and why this fact could not be proved, as well as any and all other facts bearing upon the question, is not made apparent." From *Alexander v. United States, supra*: "Evidence was admitted tending to show that Mrs. House and Steadman had been seen in conference the day before and that the general impression in the neighborhood at the time was that they had gone off together. House and his friends had armed themselves with guns and pistols and had ridden through the country hunting for them, under the belief that they were hiding together in the neighborhood, or had fled the country together. Now, if evidence was admitted to show that House had armed himself, and was hunting for Steadman under the impression that the latter had eloped with his wife, and was secreting himself in that vicinity, it is difficult to see upon what principle his threats in that connection were excluded. Accepting the theory of the government that mere threats unaccompanied by acts of a threatening nature were irrelevant to the question of defendant's guilt, it is not easy to understand how the acts themselves could be made pertinent without testimony tending to show the reason why House had armed himself, and, with other parties, was scouring the country for Steadman. Their statements in that connection would be clearly illustrative of the act in question, and a part of the *res gestae*." In *Mutual Life Ins. Co. v. Hillman, supra*, it was said: "A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence

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of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party." The holdings in these cases accord with the fundamental rules that an accused person must be proved guilty beyond a reasonable doubt, and that if there is any reasonable hypothesis consistent with the innocence of the defendant the jury should acquit.

Appellant further complains of the refusal of the court to permit a witness to testify as an expert in relation to the quantity and quality of the light of the moon on the night of the tragedy. It was proper to show the phase of the moon and the condition of the atmosphere as facts, but an opinion as to the quantity and quality of the light was not a subject for expert testimony.

Judgment reversed, and cause remanded for a new trial.

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[No. 19,219. Filed May 29, 1900.]

CRIMINAL LAW.—Assault With Felonious Intent.—Evidence.—Evidence of an assault and battery is admissible in a prosecution for an assault with intent to commit murder under §1962 Burns 1894. *p. 668.*

SAME.—Assault.—Threats.—Evidence.—Self-Defense.—Where in a prosecution for an assault with intent to commit murder the defense was made that defendant believed when he fired the shots that the prosecuting witness was advancing toward him with a gun in his hand, and that he shot in self-defense, the court erred in excluding evidence of a prior altercation between the parties and a threat by the prosecuting witness to kill the defendant. *pp. 669, 670.*

SAME.—Self-Defense.—Instructions.—Where in a prosecution for an assault with intent to commit murder there was evidence that defendant believed when he fired the shots that the prosecuting

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witness was advancing toward him with a gun in his hand, and that he afterward saw it was an umbrella, and stopped shooting, the court erred in refusing to instruct the jury that if the accused honestly believed, and had the right to believe, that he was being violently assaulted with a dangerous and deadly weapon, and that he was in danger of receiving great bodily harm at the hands of his assailant, then his right of self-defense intervened, notwithstanding the fact that it afterward developed that the apprehended danger was not real. *pp. 669, 670.*

From the Crawford Circuit Court. *Reversed.*

J. W. Weathers and *M. W. Funk*, for appellant.

J. L. Suddarth, C. L. Fleshman, W. E. Cox, W. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

BAKER, C. J.—Appellant was convicted of assault with intent to murder one James Summers. The error assigned and presented is the overruling of the motion for a new trial.

Appellant lived with his mother a mile and a half north of Taswell in Crawford county. Summers lived three-fourths of a mile south of Taswell. A railroad runs east and west through the village along one of its streets. In the afternoon of March 18, 1899, appellant and Summers passed each other in the village, but nothing occurred between them. Appellant started along the railroad west towards a highway leading north to his home. Summers could go home, either by turning off to the south before reaching the north and south highway on which appellant lived, or by turning south at that same highway. Summers was ahead of appellant in starting home and was walking along the part of the street on the south side of the railroad. Summers stopped and talked with some one and appellant passed along the track and entered a somewhat deep cut through which the railroad runs. The street Summers was on passes over the hill through which the cut is made and then comes to the level of the railroad at the west end of the village, where the highway runs north to appellant's home. After Summers passed over the hill, he says that he

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saw appellant sitting on the railroad at the highway crossing; that, when he was within thirty-five or forty steps from appellant, the latter arose and began shooting at him; that appellant fired seven shots; that one bullet cut his coat; that he had a small black umbrella, rolled up and fastened, under his arm or in his hand; that the umbrella may have been protruding before him; that he can not say how late it was; that it was not yet dark; that he had never heard of any threats by appellant against him; that he had had trouble with appellant on December 24, 1898. The theory of the State is that appellant lay in wait for Summers and maliciously attempted to murder him. The theory of the defense is disclosed by appellant's testimony: "That was the last day of the Taswell school. I was at the school until it closed, which was about 4 o'clock in the evening. Then I went up in town. Afterwards I was at the store and around town. I saw James Summers over at the depot platform first, after the school was out. I met him once on the street or rather passed him. We did not speak. We had never spoken since December 24, 1898. I had not seen him but once since that time and I spoke to him then and he refused to speak to me. We were not friendly. I knew he was mad. I had heard that he intended to kill me if he ever got an opportunity. This was the second time I had seen him since. I came to Taswell. I carried a pistol because I was afraid of him, Summers. I had heard that he was threatening me. I bought a pistol that evening in Taswell. There was a young man by the name of Noble Denbo going to the regular army and wanted to sell his pistol and I bought it and put it in my pocket to take home. I started home. It was late in the evening when I started home. I went down the railroad as the dirt road which runs just north of the railroad was muddy. It was a muddy time. Had been raining that day. Summers was ahead of me but was on the road south of the railroad. He stopped and was talking to some men just after I started. I passed on intending to go home. I met Charley Henry on

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the railroad and we talked there together some time. I never mentioned Summers' name to Henry. I met a boy by the name of Belcher and talked to him. After I left Summers talking to those men, I did not see him any more until just before the shooting, as I could not see him before I went through a cut on the railroad. I thought he had gone home. I knew that there was a way before he got to Phil Suthard's house. I went down the railroad to where I could turn off to go home. When I got in about ten or fifteen feet from where the public road crossed the railroad where I always turn north to go home, my foot slipped off a tie and I broke my shoestring. The string was old and I stooped down and took out the old string and put in a new one. When I started to go on I broke the string in the other shoe and I stooped down to put a new one in that shoe. I had bought a nickel's worth of new strings that evening. It was dusk or getting dusk when I broke my shoestring. While I was stooping down fixing my shoestrings, I heard a noise as of some one kicking on a rock on the slant of the cut east of me. I looked up and saw James Summers coming down the slant with something in his hand which I thought was a gun. I thought he had gone into Phil Suthard's and got a gun. He had it stuck out in front of him in this way. He was only thirty feet away and was coming down the slant towards me and I, believing I was in danger of my life, pulled my pistol and began to shoot at him. I fired four shots from that pistol and the fifth shot would not go and then I pulled the other pistol I had bought and fired one shot out of it. He came on towards me until I shot the last shot. And just as I fired that shot he turned around. When he turned I saw the handle of the umbrella and saw it was an umbrella. I then stopped firing. I thought he had a gun, until he turned and I saw by the crooked handle that it was an umbrella. The second revolver I fired from was a five shooter and was loaded full. I never went towards Summers. Then I went on home. After I got over by the schoolhouse about a hundred yards away I fired

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my pistol up in the air. I fired at Summers in defense of my person. What I did was to defend myself. I thought he had a gun and I heard that he was going to kill me. I knew that he had tried to do it on December 24, 1898. Yes I have been treated for mental trouble by Dr. Gobbel of English, Dr. Sanders of Taswell, and Dr. Boyd of Paoli."

Appellant objected to the testimony of Summers that one of the bullets cut his coat. The contention is that it was erroneous to admit evidence of an assault and battery under a charge of assault. Appellant was prosecuted under §1909 R. S. 1881, §1982 Burns 1894, which reads: "Whoever perpetrates an assault or an assault and battery upon any human being, with intent to commit a felony, shall, upon conviction thereof, be imprisoned," etc. If this section be regarded as defining one crime, the objection is untenable. If the section defines two crimes, the objection is equally baseless; for the two offenses are of the same class and the penalty is identical. On the one transaction, the State has the right to elect on which offense to count, and the defendant can not complain, if the proof covers the charge, and incidentally discloses as a part of the *res gestae* the other offense also. *Bonsall v. State*, 35 Ind. 460; *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22; *Polson v. State*, 137 Ind. 519.

Appellant did not interpose a written plea of insanity. The court permitted him to prove his physical and mental condition from the first of September, 1898, to the time of the alleged assault,—that he was weak and nervous and subject to delusions that some one was about to kill him. Appellant complains of the court's refusal to allow him to prove his condition in July, 1898. "Independently of any question of insanity, the defendant in a criminal cause has the right to have his general physical as well as his mental condition at the time of the commission of the supposed crime explained to the jury, so as to put them in possession of all the facts connected with the transaction, and the better to enable them to judge of its character; but when insanity is relied

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upon as a shield against punishment, it must be specially pleaded." *Sage v. State*, 91 Ind. 141. The offered evidence was competent, and it was excluded only on the ground that it was too remote from the time of the alleged assault. In view of the full inquiry that extended back over a period of six months, and of the fact that a limit must be set at some point, it is not clear that the court abused its discretion in refusing to go back eight months.

The court refused to permit appellant to prove that at a dance in the evening of December 24, 1898, Summers had held appellant while one Brackens stabbed him in the side with a knife, and that in January and February, 1899, Summers had made threats to take appellant's life. In excluding this testimony, the court said to appellant's counsel in the presence and hearing of the jury: "The fact that it was an umbrella and not a gun is the trouble with your case." The court also refused to give the following instruction: "In this case, if you believe from the evidence that, at the time of the alleged assault, James Summers, the person upon whom it is alleged that the assault was committed, was advancing toward the accused with a closed umbrella in his hand, in such a manner and under such circumstances that the accused honestly believed and reasonably had a right to believe that he was being violently assaulted with a dangerous and deadly weapon and that he was in danger of receiving great bodily harm at the hands of his assailant, then his right of self-defense intervened, notwithstanding the fact that it afterwards developed that the apprehended danger was not real." The evidence of the prior altercation and threats was competent; the remarks of the court were improper; and the requested instruction should have been given. Whether or not appellant was honest in his claim that, in the dusk of the evening, he believed from appearances that Summers was advancing upon him with a gun, was a question that, under appellant's testimony, should have been properly submitted to the jury; and appellant had the right to corroborate his

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statement that he was in fear of Summers, by proof of existing reasons therefor. *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370; *Holler v. State*, 37 Ind. 57, 10 Am. Rep. 74; *Boyle v. State*, 97 Ind. 322; *Bowlus v. State*, 130 Ind. 227. The State refers to the case of *Martin v. State*, 5 Ind. App. 453; but the facts are not analogous.

Judgment reversed, with directions to sustain the motion for a new trial.

BARTON v. THE STATE.

[No. 19,236. Filed May 29, 1900.]

APPEAL AND ERROR.—*Record*.—*Instructions*.—*Criminal Law*.—Available error cannot be predicated upon the action of the court in refusing offered instructions in the trial of a criminal cause, where the record does not affirmatively show that it contains all of the instructions given. p. 671.

EVIDENCE.—*Criminal Law*.—Evidence of defendant's failure to appear to the indictment according to the conditions of his recognizance, the forfeiture of his bail, his flight and re-arrest afforded some basis from which guilt might be inferred. p. 671.

SAME.—*Impeachment*.—An immaterial matter cannot be made the basis for an impeaching question. p. 672.

From the Wells Circuit Court. *Affirmed*.

A. N. Martin and W. H. Eichhorn, for appellant.

W. L. Taylor, Attorney-General, A. M. Waltz, F. C. Dailey, Merrill Moores and C. C. Hadley, for State.

DOWLING, J.—Appellant was charged upon affidavit and information with an assault and battery with intent to commit a rape.

Plea of not guilty; trial by jury; verdict of guilty; motion for new trial overruled; and judgment on verdict.

The error assigned on this appeal is the overruling of the motion for a new trial. Thirteen reasons were stated, but only the *fifth*, *sixth*, *seventh*, *eighth*, *ninth*, *tenth*, and *twelfth* are discussed in the brief for appellant. Under the rule of this court the points not discussed must be regarded as waived. *Smith v. State*, 140 Ind. 343.

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The *fifth*, *sixth* and *seventh* reasons for a new trial relate to supposed errors of the court in giving, modifying, and refusing to give instructions. The condition of the record is such, however, that we cannot review the action of the trial court in respect to these rulings. While certain instructions are properly set out in the bill of exceptions, it does not appear that these were the *only* instructions given.

The rule governing this court in criminal cases is that, unless the bill of exceptions affirmatively shows that it contains all the instructions given by the court, it will be presumed that other instructions were given which contained the substance of all instructions properly asked for, and withdrawing, or correcting, all erroneous instructions which appear to have been given. *State v. Winstandley*, 151 Ind. 495, and cases cited.

The *eighth* reason assigned for a new trial was the admission in evidence of an entry in the order-book of the court showing the failure of the appellant to appear to the indictment according to the condition of his recognizance, and the forfeiture of his bail. This evidence was introduced in connection with certain oral proof of the flight of the defendant, and his subsequent re-arrest. It was competent, and, unexplained, in connection with other circumstances, afforded some basis from which guilt might be inferred. *Hittner v. State*, 19 Ind. 48; Wharton's Crim. Ev., §750, note 9, and authorities cited.

The *ninth* reason for a new trial was in these words: "Because the court erred on the trial in permitting the plaintiff to prove by the witness, Samuel Valentine, the latter's declaration to Ed. Zoll, of the situation of Julia Zoll, the prosecuting witness." The statement of this reason is so vague and ambiguous that the court might well have disregarded it on that account. An examination of the record, however, discloses that no declaration whatever was made by the witness to Edward Zoll, in regard to the situation of Julia Zoll. All that appears is that, in answer to a question, the

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witness stated that he went to the residence of Julia Zoll's parents, and had a conversation with Edward Zoll, but nothing said in that conversation was repeated.

The *tenth* reason for a new trial is not set out in the record.

The *eleventh* alleges error in the action of the court in permitting a witness, Addie Acton, to testify to a statement made by her to Edward Zoll and his wife, the parents of the prosecuting witness, as to the whereabouts of the latter shortly after the felonious assault upon her. The bill of exceptions shows that no such statement was made.

The *twelfth*, and last point presented, is that the court erred in refusing to permit the appellant to prove by one John Horner, a witness for the appellant, that the prosecuting witness had promised to go buggy riding with him, Horner, on the evening the criminal assault and battery occurred.

Whether considered as original proof, or as impeaching testimony, the proffered evidence was wholly immaterial. The court had permitted counsel for appellant to ask the prosecuting witness whether she had made such an engagement, and she answered that she had not. The fact proposed to be proved, and upon which the prosecuting witness was expected to be contradicted, being an immaterial one, was, therefore, not a sufficient basis for the introduction of impeaching testimony. *Blough v. Parry*, 144 Ind. 463; *Paxton v. Dye*, 26 Ind. 393; *Brown v. Owen*, 94 Ind. 31; *Carpenter v. Lingenfelter*, 42 Neb. 728, 60 N. W. 1022, 32 L. R. A. 422.

Judgment affirmed.

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WESTERVELT ET AL. v. THE NATIONAL PAPER AND
SUPPLY COMPANY.

[No. 18,297. Filed May 29, 1900.]

MASTER AND SERVANT.—Trade Secrets.—Injunction.—Where a company engaged in the manufacture of paper bags employed a person to work in its factory who had partially completed a paper bag machine, with the understanding that the employe should complete the machine at the expense of the company, and that the machine when completed should belong to the company as a trade secret, an action may be maintained by the company to enjoin the employe and others assisting him from manufacturing the machine for the use of others. *pp.* 673-678.

SAME.—Trade Secret.—Injunction.—Where one employs another to work for him in a business in which he makes use of a secret process, or of machinery invented by himself, or by others for him, the nature and particulars of which he desires to keep a secret, of which desire the employe has notice, the law will imply a promise to keep the employer's secret, and any attempt on the part of the employe to use the secret process or machinery, or communicate the secret to others, will be enjoined by a court of equity. *pp.* 678, 679.

APPEAL AND ERROR.—Evidence.—When Not All In Record.—Drawings.—Where in the trial of a cause the witnesses in describing a machine did so with reference to drawings thereof which were before the court, and such drawings are not made a part of the record on appeal the evidence cannot be reviewed. *p.* 681.

From the Elkhart Circuit Court. *Affirmed.*

Andrew Anderson, for appellants.

J. M. VanFleet and V. W. VanFleet, for appellee.

MONKS, J.—Appellee procured a judgment in the court below enjoining appellants from divulging or using a trade secret.

The assignment of errors calls in question the action of the court in overruling appellants' demurrer to the complaint and in overruling appellants' motion for a new trial.

It is alleged in the complaint, in substance, that appellee was engaged in the business of manufacturing paper bags, and appellant, Taggart, then had some skill and experience

154	673
161	708
154	673
168	458

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in the manufacture of paper bags, and had a machine partially completed for the purpose of aiding in the manufacture of such bags; that, in consideration of this skill and experience and of the ideas he professed to have, and of the fact that he had said incomplete machine, appellee, in August, 1895, entered into a contract with him to work in its factory, in the manufacture of paper bags, for \$12 per week; that he was to furnish his services and his incomplete machine, known as a tubing machine, which machine appellee was to furnish the means to complete. It was the understanding and agreement between appellee and said Taggart that his ideas and inventions and discoveries concerning said proposed machine should belong to appellee, and it was not contemplated by either party that a patent should be taken out upon anything which he might invent or discover, but that it should be kept a secret. At the time said contract was made both parties well knew that there was no certainty that said Taggart would be able to construct a practical machine, and that he was to experiment in that direction at the cost of appellee, and appellee should furnish all things and help necessary to carry on said experiments. It was a part of said contract with said Taggart that he should make a complete machine for appellee, and for no other person, and both parties understood by that language that no machine embodying the ideas which said Taggart expected to put into practical form should be made by him for any other person, and his perfected ideas should not be divulged to any other person. At the time Taggart was so employed by appellee he had no means of his own to obtain things with which to experiment, nor could he spare the time to make experiments, and he well knew that the object of appellee was to obtain a machine which would compete with those having similar machines and to undersell those who could not obtain as good machines as those it hoped said Taggart would invent. Both parties well knew that the latter object could not be accomplished unless the ideas said Taggart might use in con-

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structing said machine should be kept a secret, and not divulged. At the time said contract was made, tubing machines for the purpose of aiding in the manufacture of paper bags were not new. There were also machines in existence which would so fold and paste one end of a paper tube as to form a complete paper bag, and the construction of these latter machines was a secret not generally known to those engaged in the manufacture of paper bags, and not known to appellee, and those owning such machines kept their construction a secret. In the manufacture of paper bags there are necessarily two processes, namely, (1) the process of folding and pressing a continuous sheet of paper into the form of a tube or cylinder, and cutting it into suitable lengths for bags; (2) the process of folding and pasting one end of said lengths together, thus forming a complete bag. Appellant, Taggart, at the time of his employment, claimed to have ideas from which he could construct a machine that would so fold and paste one end of a paper tube as to form a paper bag, and the hope which appellee had that he would be able to carry his alleged ideas into practical operation induced appellee to employ said Taggart, as he at the time well knew. That the manual labor which it was contemplated by both parties that Taggart should perform, and which he did afterwards perform, was worth no more than \$6 per week, as both parties knew when the contract was made, and the extra \$6 per week was agreed to be paid by appellee and to be received by appellant on account of his alleged ideas, and the hope that they could be carried into practical operation for the benefit of appellee. In accordance with said contract, said Taggart, in August, 1895, entered into the employment of appellee at its factory in Elkhart, and begun to put his ideas into practical form, and shortly afterwards appellee, at the request of said Taggart, secured the service of appellant Lahr, a skillful draftsman, who put the ideas of said Taggart on paper, in the form of draftings and "blue prints", which then became, and still are, the property of appellee;

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and, at the request of said Taggart, appellee employed the appellant Huston, a skillful pattern-maker, who made complete and accurate wooden patterns in accordance with said draftings and "blue prints", which patterns became, and are, the property of appellee. In order to put said ideas of Taggart into practical operation, it was necessary to employ some one to make a machine in accordance with said draftings and "blue prints" and wooden patterns, and appellee employed the appellant, the Buescher Manufacturing Company, to make a machine in accordance therewith, which said company proceeded to do, for which service appellee paid said company more than \$500, which completed machine became, and still is, the property of appellee, and there are no other machines like it. By means of said last mentioned machine, appellee was, and is, able to manufacture paper bags cheaper than theretofore, and without such machine appellee could not sell its paper bags on the general market, on account of the extra cost of closing the bottom of the tube by hand. Appellee is now selling more than 50,000 pounds of bags per month, and the same vary in size and weight. The number of bags of all sizes sold per month is at least half a million. On December 28, 1896, appellee agreed to pay said Taggart \$15 per week until April 15, 1897, from which time appellee was to pay him \$18 per week, and, as a part of said contract, appellee purchased of said Taggart said tubing machine for \$75, to be paid October 12, 1897. On January 9, 1897, said Taggart entered into a contract with appellants, Westervelt & Westervelt, to enter their service for three years, and to build for them machines which would be duplicates of appellee's complete machines. Said Westervelts, at the time they made said contract with Taggart, knew the nature of the contract with appellee, and knew that the construction of said machine was a secret for which appellee had paid said Taggart, and that he had no right to divulge it. After said contract was made with Taggart by the Westervelts, they entered into a contract with the appellant, the Buescher

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Manufacturing Company, to manufacture a duplicate of appellee's said machine, and said Buescher Manufacturing Company and its officers well knew, at the time said last mentioned contract was made, that it was in violation of the rights of appellee, and said company and its officers each knew that said machine could not be constructed unless said Taggart would divulge the secret of its construction, which belonged to appellee. In order to carry out the scheme to defraud appellee out of its trade secret, the said Buescher Manufacturing Company has employed the appellant, Huston, to duplicate the patterns of appellee's complete machine, and the Westervelts have employed the appellant, Lahr, to duplicate appellee's draftings and "blue prints" of its complete machines, and he is now working on the same at the home of said Taggart. Said Lahr well knows that the secrets contained in said draftings and "blue prints" belong to appellee, and that he cannot lawfully divulge them, nor aid in making a duplicate of appellee's said machines. Appellee's business is a lucrative and profitable one, and if its said trade secret is divulged it will suffer great and irreparable damage, and no one except said Taggart knows, or can divulge said secret, and he is wholly insolvent, and has no property subject to execution. All of said appellants well knowing appellee's rights in the premises, and that the construction of said machine was a secret which belonged to appellee, entered into a conspiracy to defraud appellee out of his trade secret for their own gain, etc.

It is settled by the great weight of the authorities that when one invents or discovers, or procures another to invent and discover for him and keep secret a process of manufacture, whether a proper subject for a patent or not, while he has not an exclusive right against the public, or against those who in good faith acquire a knowledge of it, yet he has such a property in it as a court of chancery will protect against one who, in violation of a contract, express or im-

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plied, or a breach of confidence, undertakes to apply it to his own use, or to disclose it to third persons, *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, and authorities cited; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12; *Eastman, etc., Co. v. Reichenbach*, 79 Hun 183, 29 N. Y. Supp. 1143; *Little v. Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487; *Morrison v. Moat*, 21 L. J. (N. S.) Eq. 248; Story's Eq. Jur., §952; High on Inj. (2nd ed.), §§19, 84, 1108; Beach on Inj., §§35, 924, 925.

In *Morrison v. Moat*, *supra*, the court said: "There is no doubt whatever that when a party who has a secret in a trade employs persons under a contract, express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret and then set it up against the employer."

In *Little v. Gallus*, *supra*, the court said: "The law raises an implied contract that an employe who occupies a confidential relation towards his employer will not divulge any trade secrets imparted to him, or discovered by him in the course of his employment." Not only the owner of such trade secret, but also his grantees are entitled to such protection. *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652 and note; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. ed. 67. Not only the person so acquiring such knowledge will be enjoined, but also all persons to whom he has disclosed such trade secret. 2 High on Inj., §984; *Morrison v. Moat*, 9 Hare, 241.

It is evident from the authorities cited that if a person employs another to work for him in a business in which he makes use of a secret process, or of machinery invented by himself, or by others for him, but the nature and particulars of which he desires to keep a secret, and of which desire on the part of the employer the employe has notice at the time of his employment, even if there is no express

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contract on the part of the employe not to divulge said secret process or machinery, the law will imply a promise to keep the employer's secret thus entrusted to him; and any attempt on his part to use the secret process or machinery, or to construct the machinery for his own use as against the master, or to communicate said secret to others, or in any manner to aid others in using the same, or in constructing the machinery, will not only be a breach of his contract with his employer, but a breach of confidence and violation of duty which will be enjoined by a court of equity.]

It is clear from the allegations of the complaint, which are admitted to be true by the demurrer, that appellee, by the expenditure of money and time, has built up a successful business, and that said success is largely due to said complete machine for the pasting of the bottoms of the paper bags, the invention and discovery of Taggart. [Said machine was a secret, and, under the facts alleged, even if no agreement was made, one would be implied that he was not to disclose the secret of the construction of the machine, or impart any information by which any one could construct such a machine. He occupied a confidential relation to appellee, and in such case the law raises an implied contract between them that the employe will not disclose any trade secret imparted to him, or discovered by him, in the course of his employment. A disclosure of such secrets thus acquired is not only a breach of contract on his part, but is a breach of trust which a court of equity will prevent.]

In *National Gum, etc., Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93, it was said on p. 225, concerning the power to restrain the disclosure of a trade secret: "That power and the extent to which the secret will be protected was examined and determined in this court in the case of *Eastman, etc., Co. v. Reichenbach* (79 Hun 138), where the cases were examined and the conclusion reached that when the value of the property rested in the secret processes which were not patented, an employe who acquired a knowl-

edge of the processes by virtue of his employment would be restrained from a disclosure of them at the suit of his employer."

It is true that it is alleged that when Taggart was employed by appellee there were in existence machines which would so fold and paste one end of a paper tube as to form a complete paper bag; but it is also alleged that the construction of said machine was a secret not generally known to those engaged in the manufacture of paper bags, and not known to plaintiff, and that those owning such machines kept the same a secret. It is not alleged that appellee's machine for pasting the bottoms of said paper bags was like those used by other parties; on the contrary, it is expressly averred that "there are no other machines like it;" nor does the mere fact that appellee's machine performed the same work as the machines referred to raise any presumption that it was the same. It appears from the complaint that said machines cannot be constructed except by the use of information furnished by Taggart in violation of his duty and agreement with appellee. As we have shown, the divulging and use of such information can be enjoined.

Moreover, the demurrer to the complaint was the joint demurrer of all the appellants, and if the facts stated in the complaint constituted a cause of action against any one or more of appellants, it was properly overruled. *Miller v. Rapp*, 135 Ind. 614, 617, 618, and cases cited. The court did not err, therefore, in overruling the said demurrer.

Each of the appellants insists that the court erred in overruling his separate motion for a new trial. The causes assigned for a new trial were that the finding was not sustained by sufficient evidence, and the same was contrary to law. The evidence is to some extent contradictory, but after a careful consideration of the same we think there was evidence which fully sustains the finding of the court. Moreover, there was evidence which not only showed that

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Taggart agreed not to disclose the construction of the paper bag machine planned by him for appellee, nor to build said machine for others, but that the conditions and surroundings under which Taggart, Lahr, Huston, Young, Buescher, and the Buescher Manufacturing Company, respectively, performed their work for appellee, were such as authorized the court to find that they must have known that appellee intended to keep said machine a secret, and from which an agreement on their part to keep the same a secret would be implied.

Appellants insist that the evidence shows that appellee's paper bag machine is a duplicate of other machines which are patented. Many of the witnesses in describing the machines alleged to be patented, as well as appellee's machine, did so with reference to some models or drawings thereof which were before the trial court, but of which this court has, and from said evidence can have, no knowledge. If any blue prints or drawings of appellee's machine are contained in the bill of exceptions, our attention has not been called to the same; but, if they were, the testimony of said witnesses is not in such form that the same could be applied thereto. It is evident, therefore, that, under the rule declared in *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 303, the bill of exceptions does not contain all the evidence given in the cause.

Finding no available error in the record the judgment is affirmed.

Baker, C. J., took no part in this decision.

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THE TERRE HAUTE AND INDIANAPOLIS RAILROAD
COMPANY v. FOWLER, ADMINISTRATOR.

[No. 18,819. Filed Feb. 28, 1900. Rehearing denied June 5, 1900.]

MASTER AND SERVANT.—*Negligence.*—*Scope of Employment.*—A complaint in an action against a railroad company for the death of a freight conductor caused by a trestle giving way, alleged that decedent in charge of a train arrived late at night at a station about a mile from the trestlework, and was informed by the superintendent of the road of a severe rain-storm, and of his apprehended danger to the road at a culvert about halfway between the station and the trestle, and at another point beyond the trestle, but nothing was said about the trestle; that the conductor detached the locomotive, and with the engineer, fireman, brakeman and road superintendent, started forward to inspect the road at said points, found the first culvert uninjured and proceeded to the second, and on attempting to cross the trestle, it gave way and the conductor was killed. *Held*, that the action of the conductor was not such a departure from the work he was employed to perform as to warrant the court in ruling as a matter of law that he was thereby guilty of negligence. *pp.* 683-689.

NEGLIGENCE.—*Evidence.*—*Railroads.*—*Master and Servant.*—In an action against a railroad company for the death of a freight conductor caused by a trestle giving way, the evidence showed that the stream across which the bridge was built ran through a wooded district; that the stream was subject to sudden rises, and, when at flood, carried a large amount of driftwood; that defendant had removed a truss-bridge and replaced it with a trestle bridge, the trestle posts standing upon mudsills resting upon leveled rock stratum at the bottom of the stream, without anchors; that the trestle bents were twelve and one-half feet apart and were placed at such an angle to the channel and current of the stream that a straight line up and down the channel would not show more than three feet between the bents for the passage of driftwood; that on the morning after the accident four or five posts of the trestle were found broken and a large tree found resting on the bank below the bridge. *Held*, that the question of defendant's negligence was properly left with the jury, and that the evidence was sufficient to sustain a verdict for plaintiff. *pp.* 689-692.

From the Montgomery Circuit Court. *Affirmed.*

John G. Williams, A. D. Thomas and W. T. Whittington, for appellant.

B. Crane and A. B. Anderson, for appellee.

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HADLEY, C. J.—Suit by appellee to recover damages for wrongfully causing the death of Robert P. Fowler.

After formal averments, it is alleged in the complaint that: "For twenty-five years prior to the 1st day of March, 1896, said road was carried over a stream in said Montgomery county, known as Walnut Fork, on a Howe truss-bridge of one span, of about 150 feet between the abutments on the banks of said stream; that the bottom of said bridge was about twenty-five feet above the bed of said stream, which, at that point, consisted of smooth rock in place; that said stream flowed between well defined banks about 150 feet apart, and said road and said bridge crossed said stream at an angle of about thirty degrees; that said stream, at the place crossed by said bridge, has a great fall, and for some distance above said bridge the current is very rapid, and the stream approaches said bridge upon a curve or bend, being about 300 feet up-stream from the bridge; that said stream has always been accustomed to sudden and great floods, rising with great rapidity, and carrying great quantities of water and driftwood down said stream and under said bridge, frequently rising to a height of twelve or fifteen feet above the ordinary flow of the water; that frequently, during the time prior to the taking down of said bridge, as hereinafter alleged, said stream rose suddenly to a height of twelve or fifteen feet above the ordinary stage, carrying with it large quantities of driftwood, consisting, in part, of logs, stumps, and tops of large trees, all of which safely passed through and under said bridge without injury thereto or to said railroad; of all of which facts then, and at all times thereafter, the defendant had full notice and knowledge; that on the said 1st day of March, 1896, the defendant removed said bridge, and in the place thereof carelessly, negligently, and unskilfully constructed and placed on the smooth surface of the bottom rock of said stream another bridge, consisting of a series of bents constructed of pine timber about sixteen inches square, resting on mudsills placed upon

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the smooth surface of said rock bottom, without stays or anchors or other fastenings to hold them in place, at about an angle of thirty degrees with the thread of the stream, and at right angles with the line of said road; that twelve of said bents were placed parallel to each other, at the angle and in the manner aforesaid, on said rock bottom, twelve feet apart, and in such position with reference to said stream that an unobstructed opening of one to two feet was left for the passage of water and driftwood between said bents; that said bents acted as an obstruction to the flow of said stream, and caught the driftwood in time of high water; that, about 6 o'clock on the afternoon of July 28, 1896, while said trestlework was standing as aforesaid, a heavy and severe rain fell in said county along the line of said stream above said trestlework, and said stream rose suddenly to a height of about ten feet above the ordinary stage of said stream, carrying upon and against said trestlework large quantities of drift, logs, stumps, and large trees, which lodged against said trestlework, and, about 12 o'clock p. m. of said day, the force of the current of said stream and the backwater, caused by said trestlework and drift, forced said bents out of position, and carried them several feet downstream, and out of line with said road, and so destroyed said trestle that it was impossible for a locomotive engine or train to cross the same with safety; that on said July 28, 1896, plaintiff's decedent was in the employ of the defendant in the capacity of a conductor of a freight train, and upon said day had in charge a freight train running from Terre Haute to Logansport; that plaintiff's decedent arrived with his train at 11:30 p. m. on said day, at Crawfordsville Junction, a point on said road about one mile south of said trestlework, and was there informed by John S. Brothers, who was then road superintendent of said road, of the severe rain-storm above mentioned, and of apprehended danger to said road at a culvert about half way between said junction and said trestlework, and at another place a mile or so north of and

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beyond said trestlework; that said Brothers was the road master of defendant, having in charge the care, maintenance, and inspection of the line of said road, and knew and had knowledge of the condition of the road-bed, bridges, and trestles, and resided in Crawfordsville, in said county, within one mile of said trestlework, and upon the night of said storm was looking after the line of said road to ascertain the extent of the injuries that might have resulted from said storm; that said Brothers was at said junction, and informed decedent of the apprehended injuries to said road at the two points above mentioned, and no others; and after said Brothers and said decedent had consulted with reference to said matters, said locomotive was detached from said train, and run forward, with said Brothers and plaintiff's decedent and the engineer and fireman and a brakeman thereon, to said culvert, where it was stopped, and the road inspected and found to be uninjured; that thereupon the plaintiff's decedent and said engineer, brakeman, and fireman boarded said engine, and, without any notice or knowledge of the faulty construction and condition of said trestlework, and believing the same to be safe, and upon the order of said Brothers, started forward to inspect said place of apprehended danger north of and beyond said trestlework; that, as said locomotive approached said trestlework, the engineer discovered that said trestle and track were out of line, and before said locomotive could be stopped, or the persons thereon could get off from said locomotive, it ran upon said trestlework, which gave way, and precipitated said locomotive to the ground below and into said stream, whereby the decedent was caught between the engine and tender of said locomotive, and crushed, and carried into the water below, and drowned and killed,"—all without fault of the decedent.

Demurrer to the complaint overruled. Answer in general denial. Verdict and judgment for plaintiff. Motion for new trial overruled. Error assigned by appellant on both adverse rulings.

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The point made against the complaint is that the decedent, at the time he lost his life, was, without the direction or acquiescence of his employer, acting without the scope of his employment; that, being the conductor of a freight train, it was no part of his duty to inspect the track; and that when he detached the locomotive and went forward on it to inspect reported impairments, he was performing work which he was not employed to perform, and in respect of which appellant owed him no duty to furnish him a safe trestle over which to pass.

We concede the rule to be as contended, that the master's duty to the servant only extends to the particular work, or class of work, which the servant is employed to perform, and that when the servant, without the command or acquiescence of the master, voluntarily undertakes hazardous work outside of his employment, he puts himself beyond the protection of the master's implied obligation, and, if he is injured, he is without remedy. *Brown v. Byroads*, 47 Ind. 435; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; *Jorgenson v. Chair Co.*, 169 Ill. 429, 48 N. E. 822; *Mellor v. Merchants, etc., Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; *Knox v. Coal Co.*, 90 Tenn. 546, 18 S. W. 255; *Freeberg v. Plow Works*, 48 Minn. 99, 109, 50 N. W. 1026.

But the rule stated does not have strict application in all cases. In the presence of an emergency, when an unusual situation presents itself, and the employe, having in view the general scope of his duty, voluntarily steps outside the strict bounds of his employment, he is justified, if, under the circumstances of the case, common prudence fairly and reasonably called for the act.

The principle is clearly stated by an eminent author in these words: "While as a general rule the servant has no claim for damages for injuries received while voluntarily assuming to do something which the master did not employ him to do, yet, in case of emergency, he may of his own

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volition step outside of the line of his usual duties, and if this departure is only such as the necessities of the case fairly and reasonably call for, keeping in view the character of the work he is required to do, it will not of itself defeat a recovery of damages in case he is injured. Whether he is guilty of negligence is a question for the jury, and his conduct must be tried in the light of all the surroundings. Hence it was held that an engineer who left his engine in charge of the fireman, in violation of the rules of the company, and stepped on the main track and signaled the fireman to move his train on the side-track, and while thus engaged was run over and killed by a hand-car in charge of section-men, that he was not so without the scope of his employment, or negligent, but that his representatives could recover from the master damages for his death." Bailey's Per. Inj., Vol. 2, §3524.

In the case referred to by the author, it is said: "While it is not the duty of an engineer to leave his engine for the purpose of getting signals, still it can not be ruled as a matter of law that the plaintiff must fail in this suit because Barry stepped out on the main track to get the signals, even though it was no part of his general duties thus to do." *Barry v. Hannibal, etc., R. Co.*, 98 Mo. 62, 11 S. W. 308.

In *Seley v. Southern, etc., R. Co.*, 6 Utah 319, 23 Pac. 751, it was held that the duties of a freight conductor are "somewhat general," and that when the conductor, upon failure of the brakeman successfully to make a coupling, stepped in, and in attempting to make it lost his life, he was not so far without the scope of his employment as to preclude a recovery.

In *Somerset, etc., R. Co. v. Galbraith*, 109 Pa. St. 32, 1 Atl. 371, it was said: "Galbraith was the conductor of the train, he was bound to exercise in the interest of his employer all due care and caution. If he knew of any obstruction on the track, or had reason to expect any, it was his clear duty to guard against it. 'The conductor * * *

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is held responsible for the safe transport of his train, and that requires of him, in cases of this kind, to use judgment.'

* * * He was held, of course, to the reasonable observance of all these rules but he had a general duty and discretion to exercise in an emergency." To the same effect, see Bailey's Per. Inj. §3400; see also Thompson on Neg., 1017; *Sears v. Central, etc., Co.*, 53 Ga. 630.

As conductor of the train, it was Fowler's duty to take it safely to its destination on schedule time, or in accordance with such special orders as he might receive from his superiors. In the orderly, timely, and safe movement of the train, he was the responsible agent, and, in respect of controlling and safeguarding the train in its progress, the scope of his employment required of him such care and caution as the nature and magnitude of his trust fairly demanded.

The complaint shows that he arrived at the junction about midnight. He was there informed that there had been a heavy rainfall in the vicinity; that two culverts, one a half-mile and the other about two miles north of the junction, had probably been rendered unsafe to the passage of his train. His informant was appellant's road master in charge of all that particular part of the road, and who lived in the neighborhood, and but a mile distant from the fatal trestle, and whose duty it was to keep well informed of the condition of the road, and who, in describing to Fowler apprehended injuries to the track, had made no mention of the trestle. As an employe, alert to his employer's interest, and to the discharge of his duty as the responsible manager of the train, what was the deceased to do? To have run the train forward, heedless of the warnings, would have been positive negligence. To have run the whole train forward to the first point of apprehended injury, with the probable result of being forced to return for materials and men to make repairs, would seem unwise, and a needless waste of time. To have remained impassive at the junction with his train until the road master could

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have found his way to the questionable places, and returned with information that it was safe to proceed, would seem wholly inconsistent with his general duty to move his train safely and on time. In any view of the case, it is very clear that his prompt detaching of the engine, and taking on board one of his brakemen and the road master, probably as helpers if need be, and proceeding to the reported danger points for personal inspection, to see, with his own eyes, the character and extent of the new peril to be encountered by his train, was not such a departure from the work he was employed to perform as will warrant the court in ruling, as a matter of law, that he was thereby guilty of negligence. Beyond all question, the averments of the complaint are sufficient to withstand a demurrer.

As a reason for a new trial, it is insisted that the verdict is not sustained by sufficient evidence. It is claimed that there is no evidence to show either negligence on the part of appellant, or freedom from contributory negligence on the part of the deceased. The negligence charged against appellant is in constructing and maintaining the trestle; in failing and neglecting to maintain a proper and suitable bridge to carry the railroad over the stream; and in failing properly to guard and inspect the bridge.

The evidence tends to prove that the stream of Walnut Fork runs through a timbered district; that its current is rapid and subject to sudden rises, and when at flood carries a large amount of driftwood. On three previous occasions, namely 1875, 1883, and September, 1895, the stream was as high, and in 1883 two feet higher, than it was on the night of July 28, 1896, when Robert P. Fowler lost his life. For more than twenty-five years prior to 1896, appellant had maintained across the stream a Howe truss-bridge, having a span of more than 100 feet of clear space between the abutments; and during the previous floods of 1875, 1883, and 1895, the stream was well known

to have carried down, with its other drift, large trees and logs, and passed them without injury under the railroad bridge. In January, 1896, the appellant removed its Howe truss-bridge, and replaced it with a trestle bridge. In the new bridge there were ten bents placed at right angles with the line of the railroad, and twelve and one-half feet apart from center to center, with eleven feet of clear space between them, the trestle posts standing upon mudsills resting on the leveled rock stratum at the bottom of the creek. The rock stratum dipped to the southwest, or down-stream, and the level for the mudsills was, as a rule, but not without exception, produced by hewing down the rock at the upper end. There were no anchors placed in the mudsills. The railroad crossed the stream at an angle less than a right angle, and there was evidence tending to prove that the trestle bents were placed at such an angle to the channel and current of the stream that a straight line up and down the center of the channel would show not exceeding three feet of clear space between the bents for the passage of driftwood. On the morning after the accident, four or five posts of the trestle were found broken, and lodged in a drift down-stream, and a large tree that had never been there before was found resting on the bank a few hundred yards below the bridge. The trestle was new, well constructed for a bridge of its kind, except as may be inferred from the failure to anchor the mudsills, in good repair, and sufficient to carry four times the weight of the locomotive that fell through it, or four times the weight of the decedent's train. As the party on the engine approached the trestle, the engineer, a moment before the accident, but not in time to stop the engine, discovered that the track on the bridge was several feet out of line down-stream.

It is argued that the flood of July 28th was most unusual and extraordinary, and carried an unusual amount and quality of drift, and that the law does not require the appellant to provide against such events, and that the bridge, being

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sufficient and safe against usual floods and drifts, negligence can not be imputed to it in the erection of the trestle. If the flood of July 28th had been unprecedented, there would be substance in this contention. If such flood had never occurred within the memory of those residing in the neighborhood prior to the erection of the trestle, then the appellant had the right to assume that it would not occur at all, and would have been excused in not providing against it. But the evidence tends to show that in 1875, 1883, and in September, 1895, the stream had been as high, and the drift as great, and in 1883 higher and greater, than at the time of the accident. Of these events appellant was bound to take notice. It had been in possession of that part of the stream for twenty-seven years, and must be held to know, concerning its nature and characteristics as to floods and drift, what it might have known upon reasonable inquiry. The master carpenter in charge of that division of appellant's road, and who had been in its employ for twenty-seven years, testified that he had known the stream for twenty-seven years, remembered the floods of 1875 and 1895, and had frequently seen brush, rails, and logs being carried by its current, and that he knew as much about the stream as the neighbors, when the trestle was put in. Because the flood was unusual and extraordinary will not excuse the appellant if the character and history of the stream showed that such a flood might at some time be reasonably expected. In constructing the trestle it was required to provide against such dangers as could have been reasonably foreseen, and to adopt such precautions as men of ordinary sagacity and caution would anticipate and look forward to. *Scagel v. Chicago, etc., R. Co.*, 83 Iowa 380, 388, 49 N. W. 990; *Bogart v. Delaware, etc., R. Co.*, 145 N. Y. 283, 40 N. E. 17; *Doyle v. Chicago, etc., R. Co.*, 77 Iowa 607, 42 N. W. 555, 4 L. R. A. 420; *Carney v. Caraquet R. Co.*, 29 N. B. 425. In the last case cited it is said at page 431: "I have no doubt, * * * * that if the bridge had

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given way whilst a train with passengers had been crossing over it, the railway company would have been liable in law for all damages which resulted; and that liability would have arisen because the bridge had been insecurely and insufficiently built. There was no 'act of God' or *vis major* about it. The bridge yielded and gave way when there came more ice, a higher tide and a greater storm than usual, but not greater nor higher than a person living in that section of the country might reasonably expect would come."

If, therefore, the flood and character of the drift that broke the bridge on the night of July 28th might have been reasonably foreseen, the railroad company was required to provide against it; and however substantially constructed and strong the trestle, we can not say as a matter of law that the appellant was free from negligence in placing the bents athwart the current of the stream, which was known to be liable to sudden and great floods, and to carry a large amount of heavy and dangerous drift to beat against it. The question of appellant's negligence was properly left to the jury, as was also the question of the decedent's contributory negligence; and the verdict is sufficiently sustained by the evidence.

The action of the court in refusing to give to the jury appellant's request, number seven, is complained of. It presents the appellant's theory that the detaching of the engine by the decedent, without the order or acquiescence of appellant, and voluntarily proceeding on the engine to inspect the track, was such a departure from the duties of his employment as constituted negligence *per se*. The same question arose on the demurrer to the complaint, and, for reasons there given, we hold that the instruction was properly refused.

We find no error in the record. Judgment affirmed.

State, *ex rel.*, v. City of South Bend.

THE STATE, *EX REL.* FELDMAN, v. THE CITY OF SOUTH BEND.

[No. 18,775. Filed March 14, 1900.]

From the St. Joseph Circuit Court. *Affirmed.**George Ford*, for appellant.*O. M. Cunningham, J. F. L. Meyer and Wilbert Ward*, for appellee.

HADLEY, C. J.—The common council of the city of South Bend, as organized after the general city election held in May, 1898, on the 27th day of June, 1898, at a regular meeting of the council, appointed, by a majority vote, the relator as city attorney for the term beginning on the first Monday in September following. On July, 29, 1898, upon the receipt of official notification from the city clerk, the relator accepted said appointment, and took and filed with the clerk the required oath of office as city attorney. On August 12, 1898, the relator executed his official bond, as required by law, in the penalty and with sufficient freehold surety, as required by city ordinance, and filed the same with the city clerk. On September 2, 1898, the common council, by resolution, declared the relator removed from the office of city attorney without notice or trial. From the 12th of August to the date of the pretended removal from office, the common council failed and refused, though often requested, to act upon the approval of relator's said bond. On the 27th of September, 1898, the relator brought mandamus against the mayor and common council, reciting in his petition the foregoing facts, and praying for a peremptory writ commanding the defendants to act upon and approve his official bond as city attorney. The defendants' demurrer to the petition was sustained. The relator refused to amend, and from the judgment denying the writ he prosecutes this appeal.

The only question presented challenges the authority of the common council to remove the relator from office without notice and trial, under the provision of §3536 Burns 1894. It is contended that by the act of 1877 (Acts 1877, p. 12), as amended by the act of February 21, 1893, §3476 Burns 1894, the power of removal of appointees by a city council, at pleasure, was revoked, and that, under the amended act, when the appointment of an attorney is regularly made and accepted, it is unassailable for the full term of appointment, except for cause under §3536.

The question propounded has been ruled against the relator in *State v. Wilson*, 142 Ind. 102; *Goodwin v. State*, 142 Ind. 117. Judgment affirmed.

Carpenter v. Schaeffer.

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CARPENTER v. SCHAEFFER ET AL.

[No. 18,807. Filed April 27, 1900.]

From the Steuben Circuit Court. *Dismissed.**D. R. Best, E. A. Bratton, and C. A. Yotter, for appellant.**J. A. Woodhull and N. W. Gilbert, for appellees.*

PER CURIAM.—What purports to be a transcript of the record is not authenticated by the seal of the lower court. The question of the sufficiency of the certificate to said transcript without said seal is in all respects the same as in *No. 4 Fidelity Building and Savings Union v. Byrd et al.*, ante, 47. Upon the authority of that case and the authorities cited therein this appeal is dismissed.

THE STATE v. WINSTANDLEY ET AL.

[Nos. 18,687, 18,689, 18,690, 18,691, 18,692, 18,693, 18,694, 18,695, 18,700.
Filed April 17, 1900.]

From the Clark Circuit Court. *Affirmed.**H. C. Montgomery, W. C. Utz, J. K. Marsh, W. L. Taylor, Attorney-General, Merrill Moores and C. C. Hadley, for State.**A. Dowling, C. L. Jewett, H. E. Jewett, M. Z. Stannard, W. H. Watson, C. D. Kelso and J. V. Kelso, for appellees.*

BAKER, J.—The facts are the same as in *State v. Winstandley*, ante, 443, except as to names and amounts. On the authority of that case, the judgment is affirmed.

THE STATE v. MIDKIFF.

[Nos. 18,184, 18,185. Filed May 9, 1900.]

From the Decatur Circuit Court. *Affirmed.**Adams & Carter, Hord & Adams and E. E. Roland, for State.**B. F. Love, H. A. Morrison, J. S. Duncan, C. W. Smith and H. H. Hornbrook, for appellee.*

HADLEY, C. J.—The matters involved in this appeal are the same as those involved in the case of the *State v. Kuhn*, ante, 450, except that the appellee, Midkiff, was not at any time placed upon trial; and for reasons given in the former case the judgment in this case is affirmed.

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THE STATE, EX REL. COLSCOTT, v. BROCKMAN,
TREASURER, ETC.

[No. 18,820. Filed May 29, 1900.]

From the Union Circuit Court. *Reversed.*

G. C. Florea and L. L. Broaddus, for appellant.

S. S. Harrell and F. M. Alexander, for appellee.

JORDAN, J.—This case is a companion of *State, ex rel. Colscott, v. King, ante*, 621, and its purpose is to enforce, by a writ of mandamus, an inspection of the public records of the treasurer's office of Franklin county, Indiana.

The relator is the same person who prosecutes as such in the case of *State v. King, supra*, and the facts alleged in his petition are in all respects identical with those set forth in that case; and, upon the authority of the decision therein, it must be held that the lower court erred in sustaining the demurrer to the petition.

The judgment is therefore reversed, and the cause remanded to the lower court for further proceedings along the lines laid down in the appeal of *State, ex rel., v. King, supra*.

DEFREES v. FERSTL ET AL.

[No. 19,285. Filed May 29, 1900.]

From the St. Joseph Circuit Court. *Reversed.*

T. E. Howard and J. G. Orr, for appellant.

G. E. Clarke and A. L. Hubbard, for appellees.

HADLEY, J.—Appelles, citizens and property owners in South Bend, brought this action to enjoin the appellant from carrying out the contract set out in the complaint, according to which contract appellant was to construct a brick pavement on certain streets in said city. It is alleged in the complaint that the plaintiffs own lots abutting on the proposed improvement; that said city is a municipal corporation; that on December 11, 1899, the common council by a two-thirds vote passed a resolution declaring the existence of a necessity for the improvement, defining the kind, size, location, and terminal points thereof, ordering the city clerk to give ten days' notice thereof by two weeks' publication, and that property owners along the line of the proposed improvement should file objections to the necessity for the same with the city clerk at any time before 7:30 p. m. on January 8, 1900,—said improvement to be executed as provided by an act of

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the General Assembly approved March 8, 1889, and acts amendatory thereto; that the total cost of said improvement which will be assessed against the property bordering on the same, will be \$8,000; that the cost to each front foot will be \$8.40; that on January 8, 1900, the common council, by ordinance, ordered said improvement to be made, and authorized the mayor to enter into a contract therefor with the defendant (appellant), providing for partial estimates for completed work, and when the same should be allowed, and for full payment, and for the issuance by the city of bonds in anticipation of the collection of assessments to be made on abutters, etc., "all in accordance with the act of the General Assembly providing for street and sewer improvements in cities and towns, approved March 8, 1889, and acts amendatory thereto"; that on February 1, 1900, the mayor of said city, in accordance with the authority conferred by the common council, contracted with the defendant for the execution of said improvement, and that the latter has executed his bond and will proceed with the work if not enjoined; that if the plaintiffs are assessed with their proportion of the total cost of said improvement, according to the provisions of the act of 1889, they will thereby be deprived of their property without due process of law and in violation of the fourteenth amendment to the Constitution of the United States and of the Constitution of the State of Indiana.

Appellant's demurrer to the complaint for insufficiency of facts was overruled, and he, refusing to answer further, a judgment perpetually enjoining him from the performance of his said contract was rendered, from which he appeals.

In their brief, appellees thus state their sole contention: "That the State of Indiana, through the so-called Barrett law, threatens to deprive appellees of their property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States;" and their complaint and argument proceed upon the theory that the act of March 8, 1889, requires the assessment of the total cost of an improvement against the entire frontage equally per lineal foot irrespective of the question of benefits received, and that no hearing is provided for persons affected upon the question of special benefits.

Appellant insists that the Barrett law does not provide a "hard and fast rule" for frontage assessments, and that by section seven of said act such a hearing is provided that in every case the final assessment, as made by the common council, shall be on the basis of actual benefits received, and hence not in conflict with the federal or State Constitution.

The point in controversy has been fully considered by this court in the recent case of *Adams v. City of Shelbyville*, ante, 467, and ruled in favor of appellant's contention; and upon the authority of that case we hold that the complaint does not state facts sufficient to

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entitle appellees to the relief prayed. If the improvement is accomplished in accordance with the provisions of the act of 1889, as alleged in the complaint it will be, there exists for it full authority of law and no ground for injunction.

Judgment reversed, and cause remanded with instructions to sustain appellant's demurrer to the complaint.

Baker, C. J., dissents.

DISSENTING OPINION.

BAKER, C. J.,—For the reasons stated in my dissenting opinion in *Adams v. City of Shelbyville*, ante, 467, I think that the Barrett law as enacted and also as now construed is unconstitutional.

But, independently of the question whether the Barrett law provides for special assessments according to frontage or according to special benefits actually received, I think the property owners in this case should not be held to be remediless. If the acts done and threatened by the city are in contravention of those principles on which all the members of this court agreed in the *Adams-Shelbyville* case, the property owners should be entitled to an injunction against the city and the contractor who claims under the city,—even though the city and contractor *claim* to be acting in accordance with the Barrett law as now construed. The pretense of acting under a statute is of no avail, if the acts done and threatened are in fact unlawful. The complaint sets forth the declaratory and authorizing ordinances under which the contract in question was made. These declare that the work is to be done under the Barrett law and ordinance number 966 of the city. Neither this ordinance nor the contract is set forth, and it may be that their purport is not sufficiently averred; but, as I understand the pleading, the property owners allege that under the ordinance and contract the city and contractor are undertaking, threatening, and claiming the right, to fasten the whole cost of the improvement, except for street and alley crossings, upon the abutting property at a uniform rate per front foot.

Further, I understand from the complaint, though it is not alleged with very great clearness, that the city claims the right and intends to issue improvement bonds to provide for the total cost of the improvement, and either to sell them or deliver them to the contractor in payment for his work. It has uniformly been held that the city incurs no personal liability as maker on street improvement bonds. The reason, of course, is that the bonds represent only the liens on the abutting property. If the city were permitted to issue bonds to pay for street and alley crossings, or for that indefinite sum which the majority hold the city may be called upon to pay, the city would necessarily be the maker of such bonds and would be primarily and

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solely liable thereon. But there seems to be no provision for such bonds in the Barrett law.

The contractor would have some difficulty in foreclosing the lien represented by such bonds. I think that the only bonds provided for in the Barrett law are those issued in anticipation of the collection of such assessments as have been divided into ten annual instalments by the action of the property owners in signing waivers of illegality and irregularities. Section seven, as modified by the act of March 3, 1893, Acts 1893 p. 283, requires that all assessments against property whose owners do not sign waivers shall be paid "in full when made," and provides for placing only the assessments against property whose owners do sign waivers on the city tax duplicate in ten annual instalments. The bonds are made payable in ten annual payments out of the fund derived from the assessments put upon the tax duplicate. And it is bonds, "for the purpose of anticipating the collection of such assessments," that the city is empowered, under section eight, to issue. The property owners, as citizens and general taxpayers, certainly have the right to an injunction against the issuance of any street improvement bonds except those authorized by the statute, namely, those issued after the waivers are signed, for an amount not exceeding such deferred assessments.

Again, the appellees ask an injunction because the city is incurring a debt and is already indebted beyond the constitutional limit. As, under the decisions, no debt of the city results from the contract except upon the completion and final estimate of the work, or as estimates therefor may be made from time to time, it may be that the complaint does not show with sufficient particularity that the city will be unable to pay out of the current revenues of the city its ordinary current expenses as well as its part of the expense of the improvement of the street. *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 691; *City of Laporte v. Gamewell, etc., Co.*, 146 Ind. 466; *Cason v. City of Lebanon*, 153 Ind. 567.

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1. *Notice.—Appearance.*—Where a co-party appeared, assigned errors, and filed a brief in support thereof, such appearance cured any defects in the notice given by appellant.

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4. *Vacation Appeal.—Parties Appellant.*—An appellant in a vacation appeal must join all of his co-parties or the appeal will be dismissed. *Owen v. Dresback*, 392.

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9. *Defect of Parties.*—An assignment of error on appeal that the complaint does not state facts sufficient to constitute a cause of action presents no question concerning a defect of parties plaintiff or defendant. *Ib.*

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10. *Bill of Exceptions.—Certificate.—Evidence.*—A general bill of exceptions certified by the trial judge as containing "all of the evidence offered, introduced and given in said cause to the point where the defendant rested its main case," does not show that all of the evidence was embraced in the bill of exceptions, and no question dependent upon the evidence will be considered on appeal.
Bird v. St. John's Episcopal Church, 138.
11. *Evidence.—Bill of Exceptions.*—A bill of exceptions containing the recital "this is all the oral evidence in the above entitled cause" does not show that it contains all the evidence given in the cause.
Siple v. State, 647.
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Carskaddon v. Pine, 410.
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15. *Evidence.—Bill of Exceptions.*—The act of 1897 (Acts 1897, p. 244) prescribing the manner in which the evidence may be made a part of the record on appeal does not require that the evidence be first filed with the clerk of the trial court before it is incorporated into the bill of exceptions.
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20. *Assignment of Error.—Special Findings.*—Objections that the special findings contain evidentiary facts, conclusions of law, and are outside the issues in the case, are not presented on appeal by an assignment in a motion for a new trial that the special findings are contrary to law. *Martin v. Marks, 549.*
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Capital Nat. Bank v. Reid, Adm., 54.
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45. *Motions.—Record.*—A motion to modify a judgment and the ruling thereon can only be made a part of the record by a bill of exception or order of court, and where appellants' counsel do not indicate the page and line in the record where such motion and ruling are made a part of the record by bill of exception or by order of court, it will be presumed that the same was not so made a part of the record. *Martin v. Marks, 649.*
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1. *Railroads.—Fires.—Damages.*—The owner of a building situated near a railroad is not, by his failure to watch and guard the building, guilty of such contributory negligence as to prevent a recovery for the destruction thereof by fire escaping from the railroad, although he was aware that combustible material had been permitted to accumulate upon the right of way.

Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 322.

2. *Complaint.—Railroads.*—A complaint against a railroad company for personal injuries alleged that defendant permitted a train of cars to obstruct a street in violation of §2170 Horner 1897; that plaintiff's business required him to cross defendant's tracks, and in so doing he got upon one of the flat cars, walked across to the opposite side thereof, and, in the darkness of the night, leaped to the ground and was injured. *Held*, that the complaint showed plaintiff to be guilty of such contributory negligence as to bar a recovery. *McCollum v. Cleveland, etc., R. Co.*, 97.

3. *Knowledge of Danger.—Personal Injuries.*—The fact that one injured on a defective sidewalk had previous knowledge in respect to the defective condition of the sidewalk is not alone conclusive upon the question of her contributory negligence so as to prevent a recovery for the injuries sustained, where it is not disclosed that she knew it was unsafe or dangerous.

City of Huntington v. Folk, 91.

CORPORATIONS—See **MUNICIPAL CORPORATIONS**.

COSTS—On change of venue in actions before justice of the peace, see **JUSTICES OF THE PEACE**, 1; *State, ex rel., v. Nickerson*, 439.

The costs of the sheriff in serving subpoenas upon remonstrants to a drainage proceeding should not be taxed against the petitioners. See **EVIDENCE**, 10; *Sauntman v. Maxwell*, 114.

COUNTIES—

1. *Records.—Examination by Taxpayer.*—A citizen and taxpayer of the county has such an interest as entitles him to examine the records and papers in the county auditor's office, under proper regulations, for the purpose of ascertaining the condition of the administration of the fiscal affairs of the county.

State, ex rel., v. King, Aud., 621.

COUNTIES—Continued.

2. *Records.—Examination by Taxpayer—Mandamus.*—Mandamus is the proper remedy to enforce the right of a citizen and taxpayer of the county to examine the records in the county auditor's office. *Ib.*
3. *Records.—Examination by Taxpayer.*—The fact that the board of commissioners of the county is invested with the power and duty to audit the accounts of all officers, and has the care and management of the public money does not deprive a citizen and taxpayer of the county of the right to examine the records of the county auditor's office for the purpose of ascertaining the condition of the public funds. *Ib.*

COUNTY COMMISSIONERS—

Appeal.—Abandonment of Appeal.—Dismissal.—An appeal to the circuit court from the action of the county commissioners in the establishment of a free gravel road was properly dismissed, where after filing an appeal bond the appellants instituted an action to enjoin the construction of the road and delayed taking any further steps to perfect their appeal for a period of ten months.

Whisenand v. Bell, 38.

COURT RULES—Failure to comply with the rule requiring paging of record, see **APPEAL AND ERROR**, 43, 44; *Green v. Heaston, Rec., 127; Siple v. State, 647.*

COURTS—See APPELLATE COURT.

The regular judge of a circuit or superior court may appoint a special judge to hear and determine a *habeas corpus* proceeding. See **JUDGES**; *Crawford v. Lawrence, 288.*

1. *Judgments.*—It is the duty of a court to give full faith and credit to a judgment, fair on its face, rendered by a domestic court of coordinate jurisdiction. *Bruce v. Osgood, 375.*
2. *Jurisdiction.—Special Judge.*—Where one goes to trial, without objection, before a judge who assumes to act under color of authority, he cannot, after judgment or conviction, successfully make the objection that the judge acted without authority. *Crawford v. Lawrence, 288.*
3. *Tipppecanoe Superior Court.—Statutory Construction.*—The act of 1875 creating the Superior Court of Tipppecanoe county, giving it the same power to grant restraining orders, injunctions, writs of mandate, etc., "as is now or may hereafter be conferred on circuit courts or the judges thereof" gave such court the power to issue writs of mandate and prohibition conferred upon circuit courts by the subsequent act of 1881. *Martin v. Marks, 549.*
4. *Removal of Cause to Federal Court.—Sufficiency of Petition.*—A petition for the removal of a cause from a state to a federal court on the ground of diverse citizenship alleging diverse "residence" of the parties "at the time of filing the complaint," instead of alleging diverse citizenship at the time of the commencement of the action, and also at the time the petition was filed, is insufficient where diverse citizenship of the parties is not shown by the pleadings. *Green v. Heaston, Rec., 127.*

COVENANTS—

Breach of Warranty.—Measure of Damages.—On a breach of covenants of warranty and partial eviction by reason of the failure of title to a portion of the real estate conveyed, the damages recoverable are the proportionate part of the purchase price with interest. *McNally v. White, 163.*

CRIMINAL LAW—Continued.

his assailant, then his right of self-defense intervened, notwithstanding the fact that it afterward developed that the apprehended danger was not real. *Ib.*

16. *Evidence.*—*Assault with Intent to Kill.*—A verdict convicting defendant of assault and battery with intent to commit voluntary manslaughter will not be disturbed on appeal on the evidence, where there was evidence that defendant, while driving along the road in a sleigh, met the prosecuting witness, who was driving a team of horses attached to a sled loaded with logs, called out to the driver to give him the road, and, upon reply of the driver that he could not, jumped out of the sleigh; and said, with an oath, "you can give the road, I will kill you," and drew his revolver and fired at the driver. *Keesier v. State, 242.*

17. *Instructions.*—Instructing the jury in a prosecution for assault with intent to kill that the felonious intent alleged in the indictment might be inferred from the evidence, if facts were proved which satisfied the jury beyond reasonable doubt of its existence, without a statement or description of the acts or declarations which would authorize such inference, was not reversible error, where the jury were clearly informed in another instruction of the character of the evidence from which such intent might be presumed. *Ib.*

18. *Banks and Banking.*—*Embezzlement.*—*Indictment.*—The same rules of pleading applicable in the prosecution of an official for embezzlement are to be accepted in determining the sufficiency of an indictment against bank officials, under §2031 Burns 1894, for receiving bank deposits when the bank is insolvent. *State v. Winstandley, 443.*

19. *Banks and Banking.*—*Embezzlement.*—*Indictment.*—An indictment under §2031 Burns 1894 charging the president and cashier of a bank with having received bank deposits when the bank was insolvent is bad for failure to charge that the money was received by them in their official capacity. *Ib.*

20. *Banks and Banking.*—*Insolvency.*—*Embezzlement.*—*Evidence.*—In a prosecution under §2031 Burns 1894 making it unlawful for an insolvent bank to receive a deposit from any person not indebted to the bank upon a matured claim or demand to an amount equal to or in excess of the deposit, the State is not required to prove that such depositor was not indebted to any of the bank's officers. *State v. Cadwallader, 607.*

21. *Banks and Banking.*—*Insolvency.*—*Embezzlement.*—*Evidence.*—In the prosecution of a bank official under §2031 Burns 1894 for receiving a deposit when the bank was insolvent, the State is not required to allege and prove that the officer knew that the bank was insolvent at the time he received the deposit as such want of knowledge is matter in defense. *Ib.*

22. *Banks and Banking.*—*Insolvency.*—*Embezzlement.*—*Knowledge of Officer.*—An officer of a bank who receives a deposit when the bank is insolvent in violation of §2031 Burns 1894 is not relieved from liability under the statute by his lack of knowledge of the insolvent condition of the bank where his ignorance of such insolvency was due to his own fault or negligence. *Ib.*

23. *Banks and Banking.*—*Insolvency.*—*Embezzlement.*—*Knowledge of Officer.*—*Presumption.*—*Evidence.*—The presumption that a bank official who had been president of the bank for three years knew of the insolvent condition of the bank at the time he received

CRIMINAL LAW—Continued.

- a deposit may be rebutted by evidence that in fact he, without his own negligence or fault, was ignorant of the true condition of the bank at the time the deposit was received. *Ib.*
24. *Banks and Banking. — Insolvency. — Embezzlement.* — Under §2031 Burns 1894 making it unlawful for an insolvent bank to receive a deposit from any person not indebted to it, the indebtedness of the depositor must be upon a claim or demand held by the bank against such depositor equal to or in excess of the deposit, and due from him at the time of the deposit. *Ib.*
25. *Instructions. — Defense of Insanity.* — Where in a prosecution for murder the question of the sanity of defendant was in issue, defendant was not entitled to an instruction as to the presumption that insanity once shown to exist is presumed to continue, in the absence of proof that defendant at any time had been insane, and he could not be injured by an instruction, even if imperfect or incomplete, applicable only to a state of facts which was not shown by the proof. *Blume v. State, 343.*
26. *Instructions. — Murder. — Absence of Motive as Evidence of Insanity.* — Where in a prosecution for murder the evidence showed that the relations between defendant and deceased were immoral and illicit and her character and mode of life kept him unhappy and jealous, and the repugnance for him manifested by the woman in the latter part of their acquaintance, on account of his diseased condition, inflamed his resentment against her, an instruction that absence of motive might be considered as a circumstance indicating insanity was properly refused. *Ib.*
27. *Murder. — Defense of Insanity. — Evidence. — Letters Written by Defendant. — Expert Testimony.* — Where in a prosecution for murder the sanity of defendant was in issue, letters written by defendant to the deceased shortly before the homicide were properly admitted in evidence for the purpose of obtaining the opinion of an expert witness upon the question of the sanity of defendant. *Ib.*
28. *Instructions. — Defense of Insanity. — Reasonable Doubt.* — An instruction on the question of sanity in a prosecution for murder that where insanity has once been shown to exist, it will be presumed to have continued until the contrary has been shown by the evidence is not bad for failure of the court to add the words "beyond a reasonable doubt" where the jury were told in other instructions that they could not convict defendant unless his guilt was established beyond a reasonable doubt. *Ib.*
29. *Instructions. — Defense of Insanity. — Harmless Error.* — An instruction in a prosecution for murder that a man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions, and if he yields to wicked passions, and purposely and maliciously slays another, he cannot escape the penalty on the ground of mental incapacity was harmless even though the evidence showed that defendant was of unsound mind. *Ib.*
30. *Defense of Insanity. — Opinion Evidence.* — The testimony of a witness upon the issue of the sanity of the defendant in the trial of a criminal action was properly admitted in evidence, where the witness gave the facts and circumstances upon which his opinion was founded, as the weight to be given the testimony was a question for the jury, and depended upon the facts narrated as the basis of the opinion. *Ib.*

CRIMINAL LAW—Continued.

81. *Evidence. — Declarations of Deceased. — Res Gestae. — Homicide.*—In a trial for murder, evidence that when the shot was fired deceased staggered back about five feet, dropped the baby she was holding in her arms, sank upon her knees and exclaimed that her husband had shot her, was admissible as part of the *res gestae*.
Green v. State, 655.
82. *Defense of Insanity. — Question of Fact.*—The fact of sanity, when properly put in issue in the trial of a criminal cause, like any other material fact in the case, is considered by the jury, and found by the verdict, and such result, when fairly arrived at, will not be disturbed on appeal.
Blume v. State, 343.
83. *Evidence. — Dying Declarations.*—Proof that declarant was under the sense of speedy and certain death may be afforded by circumstances, even in the absence of any direct statement to that effect by the declarant.
Green v. State, 655.
84. *Evidence. — Dying Declarations. — Impeachment.*—Where in a prosecution for murder the State introduced in evidence the dying declaration of deceased that defendant shot her, the defendant was entitled to prove that deceased made statements, during the two weeks she languished from the wound, contradictory to the dying declaration proved by the State, as an impeachment of the dying declaration.
Ib.
85. *Evidence. — Dying Declarations.*—Where the court in a murder trial admitted in evidence the dying declaration of the deceased that her husband shot her, the declarant's statement that she was mortally wounded and must die was admissible in order that the jury might know all of the surrounding circumstances so as to determine what credit should be given to the declaration.
Ib.
86. *Evidence. — Dying Declarations. — Impeachment.*—Where in a murder trial the State introduced in evidence the dying declaration of deceased, that defendant, her husband, shot her, and showed that the shot was fired from a small caliber revolver, that the assassin had on a man's attire, including a long overcoat, and spoke in an assumed voice that sounded as much like a woman's as a man's, and defendant introduced another dying declaration of the deceased that a certain named woman was the assassin, the defense was entitled to prove that such woman a few days before the murder took a small caliber revolver to a gunsmith to be repaired, and got the revolver on the day of the murder, and that on the evening of the murder she left her house, disguised as a man, with a man's overcoat on, and went in the direction of the house of deceased.
Ib.
87. *Murder. — Evidence. — Sufficiency.*—In a trial under an indictment for murder in the first degree the evidence showed that defendant, a young man of dissolute habits, had become attached to an inmate of a house of prostitution. A loathsome disease rendered defendant a cripple, and the refusal of the woman to cohabit with him while in this condition excited his resentment and jealousy: armed with a revolver, he went to the brothel where she resided, and after a short and apparently friendly interview, he shot and killed her, and then fired two balls into his own body. While the woman lay dying he asked if she was dead, and said "I have fixed her." A short time before the homicide, in a conversation with a friend, he declared that he would "fix her." *Held*, that the evidence was sufficient to warrant a conviction for murder in the first degree.
Blume v. State, 343.

CRIMINAL LAW—Continued.

38. *Evidence.—Admission of Guilt by Another.*—Evidence in a murder trial tending to prove that a person other than defendant, subsequent to the homicide, admitted her guilt was not admissible.
Green v. State, 655.
39. *Discharge of Defendant for Delay in Prosecution.*—A judgment discharging defendant from an indictment pending against her for failure of the State to bring the cause on for trial within the time prescribed by §1852 Burns 1894 will not be reversed on the ground that the time of the court was occupied in the trial of other causes, where it was shown that at least eight days of the third term after defendant was admitted to bail were occupied in the trial of civil causes.
State v. Kuhn, 450.
40. *Rape.—Evidence.*—Where in a conviction for rape the evidence failed to show the name of the person upon whom the rape was alleged to have been committed the judgment will be reversed.
McFarland v. State, 442.
41. *Evidence.—Deadly Weapon.*—Proof that the weapon used was a Smith & Wesson revolver of thirty-two caliber was a sufficient basis for an instruction as to the use of a deadly weapon in a prosecution for assault with intent to kill, without specific evidence that the weapon used was a deadly one.
Keesier v. State, 242.
42. *Evidence.—Cross-Examination.*—A question asked a witness for the State on cross-examination if he and another boy did not stone the house of defendant's brother, where defendant was staying, was not competent as showing hostility of the witness to defendant.
Whitney v. State, 573.
43. *Evidence.—Cross-Examination.*—A question asked a witness for the State on cross-examination for the purpose of showing the ill feeling of the witness and his associates toward defendant "Isn't it a fact that you boys have got it in for defendant?" was incompetent, where none of the persons supposed to be hostile was named or described in any manner, and the signification of the slang phrase was not explained to the witness.
Ib.
44. *Evidence.—Admissions of Third Persons.*—A defendant on trial will not be permitted to show that another person admitted that he committed the crime, and the fact that the person referred to was jointly indicted with defendant for the same offense, and had been tried and convicted, does not change the rule.
Siple v. State, 647.
45. *Evidence.—Sufficiency.—Appeal and Error.*—Where in the trial of one charged with larceny the evidence was of such a character as to warrant a reasonable conclusion that defendant was connected in some manner with the larceny, the Supreme Court will not reverse a judgment of conviction on the insufficiency of the evidence.
Weaver v. State, 1.
46. *Instructions.—Relationship of Witnesses to Accused.*—An instruction in the trial of a criminal action that in determining the weight to be given to the testimony of the different witnesses they might take into account, among other things, the relationship they sustained, if any, to the accused, was not erroneous.
Keesier v. State, 242.
47. *Instructions.—Reasonable Doubt.—Influence of Fellow Jurymen.*—An instruction that a doubt as to the guilt of the accused in the minds of one or more of the jurors ought not to control the action of the other jurors, if any, so as to compel them to agree to a

CRIMINAL LAW—Continued.

verdict of acquittal, if convinced beyond a reasonable doubt of the guilt of defendant, was not erroneous, where the jury were also instructed that if any one of them, after duly considering all of the evidence in the case, and consulting with his fellow jurymen, entertained a reasonable doubt as to the guilt of the defendant, or as to the existence of any fact or element necessary to constitute his guilt, the jury could not convict the defendant. *Ib.*

48. *Intimidation of Witnesses.—Evidence.*—Evidence of attempts on the part of accused to bribe or intimidate witnesses may be properly considered in determining the guilt or innocence of the accused, and is admissible for such purpose. *Keesier v. State, 242.*

49. *Gift Induced by False Pretenses.*—One obtaining a gift by false pretenses may be prosecuted therefor, under §2204 Horner 1897.

State v. Styner, 131.

DAMAGES—See CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT; NEGLIGENCE; RAILROADS.

In an action to enjoin the obstruction of a highway, see **HIGHWAYS**, 2, 3; *Martin v. Marks, 549.*

For delay in construction of building as provided by contract, see **CONTRACTS**, 7; *Bird v. St. John's Episcopal Church, 138.*

Measure of damages in an action on a breach of covenants of warranty and partial eviction by reason of the failure of title to a portion of the real estate conveyed, see **COVENANTS**; *McNally v. White, 163.*

Liability of sheriff for taking and circulating photograph and description of prisoner, see **SHERIFF**, 1, 2; *State, ex rel., v. Clausmeier, 599.*

Recovery of damages against a railroad company by mere licensee for personal injuries, see **RAILROADS**, 4; *Lingenfelter v. Baltimore, etc., R. Co., 49.*

When judgment will not be reversed on account of excessive damages being awarded, see **APPEAL AND ERROR**, 57; *City of Goshen v. Alford, 58.*

DECEDENTS' ESTATES—See DESCENT AND DISTRIBUTION. As to sales of real estate, see **EXECUTORS AND ADMINISTRATORS**, 1, 2, 3; *Bell v. Shaffer, 418.*

Children by a former marriage have no present estate in the interest of a childless second wife in the real estate of their father. See **EXECUTORS AND ADMINISTRATORS**, 3. *Ib.*

The Appellate Court has jurisdiction of all cases involving claims against decedents' estates. See **APPELLATE COURT**; *Ray v. Moore, Adm., 368.*

DEDICATION—

1. *Acceptance.—Highways.*—To constitute a dedication of land for highway purposes, there must be an offer of the land by the owner, and acceptance of such offer by the public or by the proper local authorities. *Lightcap v. Town of North Judson, 43.*

2. *Revocation.*—The owner of certain real estate offered to dedicate a part thereof to the public for highway purposes. Before the

DEDICATION—Continued.

offer was accepted such owner sold and conveyed the real estate, the deed of conveyance containing no reservation of the part so offered to the public. *Held*, that the conveyance constituted a revocation of the offer to dedicate. *Ib.*

3. *Prescription.—Public Use.*—The fact that a strip of railroad right of way within the limits of a city, used by the railroad company as a freight yard, was traveled upon by persons who had no immediate business with the railroad company as well as by persons in receiving and delivering their freight, furnishes no evidence of title in the city. *Baltimore, etc., R. Co. v. City of Seymour, 17.*
4. *Prescription.—Property Once Dedicated to Public Use.—Evidence.*—In the trial of an action by a railroad company to enjoin a city from paving a portion of its right of way claimed by defendant as part of a street, it was error to admit in evidence the proceedings of the common council had in the year 1867 in reference to sidewalks and street gradings thereon, since cities had no power prior to 1891 to seize property previously taken for a public use. *Ib.*
5. *Prescription.—Evidence.—Railroads.*—In an action by a railroad company to restrain a city from paving a portion of its right of way claimed by defendant as part of a street, the city introduced in evidence a plat of the land filed by the owner showing city blocks laid off on either side of the railroad with an open space between the blocks and the line of the railroad with the words "Railroad Avenue" and the number 50 on one side of the line, and "O. & M. Railroad" and the number 68 on the other side. The width of the right of way was not indicated on the plat. It was shown that the owner of the land thereafter deeded to the railroad company an eighty-foot right of way through such land "as staked, marked, surveyed, and located;" that shortly after making the plat, and before executing the deed to the company, a public auction was held of lots abutting on Railroad Avenue but there was no evidence that the bidders ever completed their purchases, or that the right of way was represented to them to be of less degree than absolute or of less width than eighty feet. *Held*, that the evidence failed to show a dedication of any part of the eighty-foot right of way as a street, either by grant or by acts *in pais*. *Ib.*

DEEDS—A deed to a husband and wife "jointly" creates an estate by entireties. See **HUSBAND AND WIFE**, 1; *Simons v. Bollinger, 83*.
A mortgage executed by a grantor of real estate to secure grantee from loss by reason of an alleged outstanding paramount title to part of the real estate conveyed runs with the land. See **INJUNCTION**, 8; *Rowe v. Hamberger, 604*.

DEMURRER—To answer in abatement cannot be carried back and sustained to the complaint. See **PLEADING**, 3; *Goldsmith v. Chipps, 28*.

DESCENT AND DISTRIBUTION.—Children by a former marriage have no present estate in the interest of a childless second wife in the real estate of their father. See **EXECUTORS AND ADMINISTRATORS**, 3; *Bell v. Shaffer, 413*.

Debts of Testator.—Liabilities of Distributees.—Sales of Real Estate for Payment of Debts.—Contribution.—Plaintiff as executor filed a

DESCENT AND DISTRIBUTION—Continued.

petition to set aside a conveyance of eighty acres of land made to defendant by testator, and for the sale thereof for the payment of a mortgage and other debts of testator. Defendant filed a cross-complaint showing that the mortgage was executed by testator upon 241 acres of land owned by testator which he afterward conveyed as gifts, in parcels, to several persons, including cross-complainant, making the several grantees defendants to the cross-complaint, and asking for the enforcement of a ratable contribution from all. *Held*, that the facts averred were sufficient to entitle cross-complainant to a decree making the indebtedness a charge against all of the parcels of land conveyed by testator as benefactions according to the value of the several parcels. *Kaufman v. Elder, Ex.*, 157.

DOWER—Assent of wife to take pecuniary provision made for her in lieu of her interest in the lands of her husband, see **HUSBAND AND WIFE**, 6, 7, 8; *Mannan v. Mannan*, 9.

DRAINS—

1. *Petition. — Jurisdiction. — Drainage Law of 1889.* — A petition for drainage averring that numerous bodies of land, particularly described, will be benefited by the proposed drainage, that many highways and streets will be improved and benefited by the proposed drainage, that the public health will be promoted, and that the proposed results can most readily be accomplished by straightening and deepening the river and constructing lateral drains, and that construction of the drain is impracticable except by going through the corporate limits of a certain city, is sufficient, under the drainage law of 1889, without alleging the particular circumstances by reason of which the proposed drainage could not be accomplished without extraordinary labor and expense and in the best and cheapest manner, except by passing through the corporate limits of a city. *Sauntman v. Maxwell*, 114.
2. *Remonstrance. — Drainage Law of 1889.* — Section two of the act of 1889 amending the drainage law of 1885, providing that a drainage petition shall be dismissed if two-thirds of the landowners remonstrate, does not repeal the proviso of section three of the original act that the remonstrants shall be resident landowners, but operates merely as an exception to the rule laid down in section three of the original act, and is applicable to a proceeding for drainage by country and city conjointly. *Ib.*
3. *Jurisdiction of Circuit Court. — Drainage Law of 1889.* — The legislature may give circuit courts jurisdiction over the matter of drainage in country and city conjointly, although previous exclusive jurisdiction was granted the common council over drainage within the corporate limits of cities. *Ib.*
4. *Jurisdiction. — Drainage Law of 1889.* — If the object of straightening a water course is to prevent the banks from washing, to protect a highway, to avoid the construction of a bridge, or the like, the boards of county commissioners have exclusive jurisdiction; but if the object is the drainage of wet lands, and the improvement of the water course is merely a means to that end, the circuit court has jurisdiction under the drainage act of 1889. *Ib.*
5. *Drainage Law of 1889. — Constitutional Law.* — The drainage act of 1885 as amended in 1889 (Acts 1889, p. 285) is not void for uncertainty as violative of the provision of §20, article 4 of the

DRAINS—Continued.

- Constitution that "Every act and joint resolution shall be plainly worded, avoiding as far as practicable the use of technical terms." *Ib.*
6. *Remonstrance.—Grounds of Objection.*—As no grounds need be stated in a remonstrance against the construction of a drain under the act of 1885 as amended in 1889, several papers stating different objections to the proposed drain, signed by remonstrators, may be put together, and all of the headings but one stricken out, and presented as one remonstrance. *Ib.*
 7. *Remonstrance.*—A remonstrance against the construction of a drain under the act of 1885 as amended in 1889 is not a pleading, and need not state facts sufficient to constitute a defense to the petition. *Ib.*
 8. *Remonstrance.—Dismissal of Proceeding.*—The necessity for the drainage of country lands by means of a drain passing through the corporate limits of a city is a jurisdictional fact to be found by the court, and the dismissal of a drainage petition on a remonstrance signed by two-thirds of the resident owners, but less than two-thirds of all landowners affected, is equivalent to a finding that such necessity does not exist, and is not reviewable. *Ib.*
 9. *Remonstrance.—Withdrawal of Remonstrant.*—Under the drainage law of 1885 as amended in 1889 (Acts 1889, page 285) a period of ten days after the docketing of the cause is allowed for the filing of a remonstrance for the dismissal of the petition, and after the ten days have elapsed, the question for determination is whether or not the required number of landowners with proper qualifications were remonstrants at the expiration of the ten days' period, and no remonstrant can subsequently withdraw. *Ib.*
 10. *Remonstrance.—Drainage Law of 1889.*—There is no warrant to act under amended section two of the drainage law of 1885 as amended in 1889, providing that a drainage petition shall be dismissed if two-thirds of the landowners remonstrate, unless the court finds that the drainage cannot be accomplished without extraordinary labor and expense, and in the best and cheapest manner, except by passing through a city. *Ib.*
 11. *Drainage Law of 1889.—Construction.*—The act of 1889 (Acts 1889, p. 285) amending the drainage law of 1885 was intended to apply to the drainage of country lands where no outlet was available without extraordinary labor and expense, except through the corporate limits of a city. *Ib.*
 12. *Assessments.—Vacation.—Supplemental Petition.*—Defendant by plea in abatement secured an order of court vacating for want of notice certain assessments made against its lands for the construction of a drain. After the work was established and the assessments approved two of the petitioners filed a supplemental petition asking that the benefits to defendant's lands be assessed thereon. *Held*, that the order of court vacating the assessment did not amount to an adjudication that defendant's lands were not benefited, and that the filing of the supplemental petition was authorized by law. *Osborn v. Maxinkuckee, etc., Co., 101.*
 13. *Supplemental Petition.—Notice.*—The court is not required to fix in advance what notice shall be given a landowner by one filing a supplemental petition showing that lands benefited by the construction of a drain were not assessed therefor, and if a proper notice is given, the court is not authorized to set the same aside. *Ib.*

DRAINS—Continued.

14. *Supplemental Petition.*—A supplemental petition showing that lands benefited by a drain were not assessed therefor, and asking that such lands be assessed, may be filed in vacation. *Ib.*
15. *Final Judgment.—Appeal.*—An order of court dismissing a supplemental petition filed under the provisions of §4279 Horner 1897 in a drainage proceeding after the work was established and the assessments approved was a final judgment within the meaning of the statute from which an appeal might be taken. *Ib.*
16. *Maintenance.—Allotment.*—The facts that lands were not assessed for the construction of the drain, and that it had been adjudged when the drain was projected that they would not be benefited by its construction, will not exempt such lands from liability for the maintenance of the drain under the provisions of §5633 Burns 1894. *Roundenbush v. Mitchell, 616.*
17. *Maintenance.—Allotment.—Constitutional Law.*—The act of 1889, §§5682–5686 Burns 1894, providing for the allotment of the work of maintaining a public drain is not unconstitutional as taking private property for public use without just compensation, and without due process of law, since the statute makes ample provision for notice to the landowners, and for a hearing upon all questions of law and fact, not only before the drainage commissioner, but, on appeal, in the circuit or superior court of the county, and by the express terms of the statute, there can be neither assessment nor allotment in the absence of equal compensating benefits. *Ib.*
18. *Statutes.—Amendment.*—Where a drainage petition was filed prior to the date of the amendment of §4286 R. S. 1881, but no action was taken thereon until after the amendatory act took effect, the proceeding was properly had under the amendatory act. *Sarber v. Rankin, 236.*
19. *Irregularities in Acceptance.*—An assessment for a drain will not be enjoined on account of mere irregularities in the acceptance of the work, where it does not appear that plaintiff did not receive all of the benefits he would have received if the work had been accepted in the manner claimed by him to be proper. *Ib.*
20. *Viewers.—Extension of Time in which to Make Report.*—A drainage proceeding is not rendered void by reason of the fact that the viewers asked and obtained two extensions of time in which to make and file their report. *Ib.*
21. *Assessments.—Notice.—Injunction.—Complaint.*—An allegation in a complaint to enjoin a drainage assessment that plaintiff had no notice of the time set for the hearing of the petition and report of viewers is insufficient in the absence of an averment that the constructive notice provided by statute was not given, since a personal notice is not required. *Ib.*
22. *Assessments.—Collection.—Injunction.*—The fact that a drain was not completed according to the terms of the contract is not sufficient ground for enjoining the collection of an assessment, since the property owner had a legal remedy. *Ib.*
23. *Joint Drains.—Manner of Procedure.—Injunction.*—The collection of an assessment for a drain constructed jointly by two counties will not be enjoined because the boards of commissioners of the two counties did not sit together and form themselves into one tribunal in acting on the petition, since if the boards adopted the wrong construction of the statute, it would amount to an erroneous exercise of power, not a usurpation. *Ib.*

DYING DECLARATIONS—It is not necessary that a dying declaration be made in the presence of defendant. See EVIDENCE, 16; *Shenkenberger v. State*, 630.

When the declaration was a statement of a fact and properly admissible in evidence, see EVIDENCE, 17; *Ib.*

When admissible in evidence in a prosecution for murder, see CRIMINAL LAW, 33, 34, 35, 36; *Green v. State*, 666.

EASEMENTS—

1. *Quieting Title. — Complaint.* — A complaint in an action to quiet title to an easement in a way adjoining plaintiff's premises, and to remove an obstruction placed there by defendants, which shows that plaintiff was entitled to use the way is good as against a demurrer. *Roush v. Roush*, 562.

2. *License.* — Where the owners of real estate abutting an alley erected buildings and made improvements on the real estate with reference to the alley, with the knowledge of each other, they cannot be deprived of the use thereof although they had merely a license to use the way. *Ib.*

EMBEZZLEMENT—Receiving deposits by bank official when bank was insolvent, see CRIMINAL LAW, 18, 19, 20, 21, 22, 23, 24; *State v. Winstandley*, 443; *State v. Cadwallader*, 607.

ESTOPPEL—When wife will be estopped from denying the validity of a mortgage executed upon real estate formerly held by herself and husband as tenants by entireties, see HUSBAND AND WIFE, 3; *Government Building, etc., Institution v. Denny*, 261.

When wife will not be estopped from contesting the validity of a mortgage executed by herself and husband on lands held by them as tenants by entireties, see MORTGAGES, 2; *Abicht v. Searls*, 594.

EVIDENCE—As to damages in an action to enjoin the obstruction of a highway, see HIGHWAYS, 2, 3; *Martin v. Marks*, 549.

As to the negligence of defendant in an action for damages for the destruction of property by fire escaping from its railroad right of way, see RAILROADS, 1, 2; *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.*, 322.

Admission of original testimony after the evidence and argument have been closed, see TRIAL, 1; *Roush v. Roush*, 562.

In a prosecution against a bank official for receiving deposits when the bank was insolvent, the State is not required to prove that the officer knew the bank was insolvent at the time he received the deposit. See CRIMINAL LAW, 21; *State v. Cadwallader*, 607.

Sufficiency of evidence to show a dedication of part of a railroad right of way, see DEDICATION, 5; *Baltimore, etc., R. Co. v. City of Seymour*, 17.

In a prosecution for receiving bank deposits when the bank was insolvent, the State is not required to prove that the depositor was not indebted to any of the bank's officers. See CRIMINAL LAW, 20; *State v. Cadwallader*, 607.

EVIDENCE—Continued.

Evidence of an assault and battery is admissible in a prosecution for an assault with intent to commit murder. See **CRIMINAL LAW**, 19; *Enlow v. State*, 664.

Letters written by defendant are properly admitted in evidence in a prosecution for murder, for the purpose of obtaining the opinion of an expert witness upon the sanity of defendant. See **CRIMINAL LAW**, 27; *Blume v. State*, 343.

When declaration of deceased is part of the *res gestae* in a prosecution for murder, see **CRIMINAL LAW**, 31; *Green v. State*, 655.

As to proof that the weapon used was a deadly one, see **CRIMINAL LAW**, 41; *Keesier v. State*, 242.

Admission of guilt by another in the trial of a prosecution for murder, see **CRIMINAL LAW**, 38, 44; *Green v. State*, 655; *Siple v. State*, 647.

Dying declarations, see **CRIMINAL LAW**, 33, 34, 35, 36; *Green v. State*, 655.

Evidence of attempts on the part of the accused to bribe or intimidate witnesses may be properly considered in determining the guilt or innocence of defendant. See **CRIMINAL LAW**, 48; *Keesier v. State*, 242.

An instruction containing language which casts suspicion upon or disparages or discredits any class of evidence is erroneous.

Shenkenberger v. State, 630.

Available error cannot be predicated upon the ruling of the court on a question and answer wholly immaterial to the issues. See **APPEAL AND ERROR**, 51; *Keesier v. State*, 242.

When drawings referred to by witness are not made a part of the record on appeal the evidence cannot be reviewed. See **APPEAL AND ERROR**, 26; *Westervelt v. National Paper, etc. Co.*, 673.

As to sufficiency of evidence on appeal, see **APPEAL AND ERROR**, 59, 60; *Stevens v. Leonard, Ex.*, 67; *Parrott v. Richardson*, 455.

Sufficiency of verdict in prosecution for assault and battery with intent to commit voluntary manslaughter, see **CRIMINAL LAW**, 16; *Keesier v. State*, 242.

Report of evidence under the act of 1897, see **APPEAL AND ERROR**, 17; *Minnick v. State, ex rel.*, 379.

Will not be considered on appeal unless all the evidence given in the case is contained in the record. See **APPEAL AND ERROR**, 31; *Siple v. State*, 647.

Must be embodied in a proper bill of exceptions before it can be certified to the Supreme Court. See **APPEAL AND ERROR**, 18; *Rohrof v. Schulte*, 183.

When bill of exceptions does not contain all the evidence, see **APPEAL AND ERROR**, 10, 11; *Bird v. St. John's Episcopal Church*, 138; *Siple v. State*, 647.

EVIDENCE—Continued.

1. *Objection.—Appeal and Error.*—An objection to the admissibility of evidence which was not presented in the trial court will not be considered on appeal. *Shenkenberger v. State, 630.*
2. *Objections.*—Where an objection is sustained, if it appears that the evidence was inadmissible for any reason, and the decision excluding it was correct, it makes no difference whether the ground of objection was sufficient or not. *Whitney v. State, 573.*
3. *Exception.—Offer to Prove.—Practice.*—In order to save an exception to the ruling of the court excluding an answer to a question propounded to a witness, a statement must be made to the court of the testimony the witness would give if permitted to answer the question, before a ruling is made on such objection, and an exception reserved to the ruling at the time it is made. *Shenkenberger v. State, 630; Siple v. State, 647; Whitney v. State, 573.*
4. *Offer to Prove.*—Available error cannot be predicated on the action of the court in refusing an offer to prove certain alleged facts, where the witness was not produced. *Sauntman v. Maxwell, 114.*
5. *Impeachment.*—An immaterial matter cannot be made the basis for an impeaching question. *Barton v. State, 670.*
6. *Weight.*—Where in an action on a note the defendant pleaded a set-off on account of rents claimed to be due under a lease, and the lease failed to show on its face any obligation against plaintiff, the action of the court in excluding the lease will not be disturbed on appeal, there being some evidence to support the finding that plaintiff was not the lessee.
Turner, Rec., v. Illinois Steel Co., 598.
7. *Railroads.—Fires.—Negligence.*—In an action for damages to property caused by fire escaping from defendant's railroad, based upon the negligence of defendant in permitting combustible and inflammable material to accumulate upon its right of way, evidence that fires were set by defendant's engines near the time of the fire in question, and near the same place, the place where the fire was set being on an up-grade, was properly admitted for the purpose of showing the negligence of defendant in permitting the combustible material to accumulate at such place.
Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 322.
8. *Harmless Error.—Fires.—Value of Property.*—Available error cannot be predicated upon the action of the court, in the trial of an action for damages for the burning of a factory, in permitting a witness to testify to the value of the property as a manufacturing plant, when the suit was brought for separate items of loss, where the facts found showed that damage was assessed at the market value of the property destroyed. *Ib.*
9. *Quieting Title.—Easements.*—In an action to quiet title to an easement in a way alleged to have been located by deeds, evidence as to the number of years the way had been used, as such, was properly admitted for the purpose of showing the construction given the deeds by the parties and those holding under them, although it was not alleged that plaintiff had title to the way by prescription. *Roush v. Roush, 562.*
10. *Costs.—Dismissal of Petition.*—Remonstrants to a proposed drain are bound to testify in their own behalf without being subpoenaed, and the costs of the sheriff in serving subpoenas upon them issued on the precept of the remonstrants, should not be taxed against the petitioners on the dismissal of the petition at the cost of petitioners. *Sauntman v. Maxwell, 114.*

EVIDENCE—Continued.

11. *Expert Witness.*—The opinion of an expert witness as to whether a proposed drain could be accomplished without extraordinary labor and expense, without passing through the corporate limits of a city, must be based upon facts either admitted to be true, or assumed, or previously testified to by the witness. *Ib.*
12. *Expert Testimony.*—*Unsoundness of Mind.*—On the trial of an action to contest a will, on the ground that the testator was a person of unsound mind, a physician shown to possess the necessary qualifications of an expert, was asked the question whether or not from his conversation with and examination of testator at a time specified, such testator "was laboring under an insane delusion or anything of that kind." To which question the witness answered in the negative. *Held*, that the answer was not objectionable as being a statement of fact, and not the expression of an opinion. *Stevens v. Leonard, Ex.*, 67.
13. *Privileged Communications.*—*Attorney and Client.*—*Wills.*—Communications between a testator and his attorney in reference to the testator's will which was drawn by such attorney, are not privileged after the death of the testator. *Gurley v. Park*, 135 Ind. 440, overruled in part. *Kern v. Kern*, 29.
14. *Criminal Law.*—Evidence of defendant's failure to appear to the indictment according to the conditions of his recognizance, the forfeiture of his bail, his flight and re-arrest afforded some basis from which guilt might be inferred. *Barton v. State*, 670.
15. *Dying Declarations.*—*Criminal Law.*—An objection to the admission in evidence of dying declarations in the trial of a murder case, on the ground that the written statement was the best evidence, was properly overruled, where it was not shown that the declaration testified to was reduced to writing. *Shenkenberger v. State*, 630.
16. *Dying Declarations.*—*Criminal Law.*—It is not necessary that a dying declaration be made in the presence of defendant in order to render it admissible in the trial of a murder case. *Ib.*
17. *Dying Declarations.*—*Criminal Law.*—In a prosecution charging defendant with poisoning her daughter-in-law, the dying declaration of deceased testified to by a witness that "This was a strange death to die, to be poisoned by her mother-in-law" was the statement of a fact, and was properly admitted in evidence. *Ib.*
18. *Weight.*—*Criminal Law.*—It is the province of the trial court to weigh and determine the credibility to be given the evidence introduced, and the Supreme Court will not disturb the judgment on the weight of the evidence where there is evidence, if worthy of belief, sufficient to sustain the finding upon every material point. *Rosenbarger v. State*, 425.
19. *Phases of the Moon.*—*Quantity of Light.*—*Expert Testimony.*—It was proper in a murder trial to show the phase of the moon and the condition of the atmosphere on the night of the tragedy, but the opinion of an expert witness as to the quantity and quality of the light was inadmissible. *Green v. State*, 655.

EXCEPTIONS—To ruling of court in excluding answers to questions propounded to a witness, see EVIDENCE, 3; *Shenkenberger v. State*, 630; *Siple v. State*, 647; *Whitney v. State*, 573.

EXECUTION—When court may decree that property be sold upon an order of sale instead of on an execution, see FRAUDULENT CONVEYANCES, 2; *McNally v. White*, 163.

EXECUTORS AND ADMINISTRATORS—Failure to pay taxes, see TAXATION, 2; *Gallup, Ex., v. Schmidt, Treas.*, 196.

1. *Sales of Real Estate.—Decedents' Estates.*—An administrator procured an order of court directing the sale of the undivided two-thirds part in value of certain described real estate, being exclusive of the widow's interest, and by virtue of such order sold the real estate at public auction. Two months thereafter he filed an amended petition, which the court permitted to be filed as of date of the original petition, alleging that the widow was a childless second wife. On the same day the administrator reported the sale of the real estate, and the court confirmed the same, and ordered that the administrator settle with the widow and allow her a fair compensation for her interest in the property, and that her interest therein be "exterminated" before the purchaser be required to pay all of the purchase money, and the administrator afterward reported a receipt from the widow stating that the sum so paid was in full of her dower in the real estate. *Held*, that the action on the amended petition was illegal and void, and whatever title was acquired by the purchaser was obtained under the first order. *Bell v. Shaffer*, 413.

2. *Sales of Real Estate.—Childless Second Wife.—Decedents' Estates.*—The court of common pleas had no jurisdiction, under R. S. 1852, to order the sale of more than two-thirds of a decedent's real estate for the payment of the claims of general creditors, where the decedent left surviving him a childless second or subsequent wife. *Ib.*

3. *Sales of Real Estate.—Childless Second Wife.—Decedents' Estates.*—Children by a former marriage have no present estate in the one-third interest of a childless second or subsequent wife in the real estate of their father, and they cannot object or defend against the sale thereof for payment of debts. *Ib.*

EXEMPTION—A decree setting aside a conveyance of real estate as fraudulent against the rights of grantor's creditors does not reinvest grantor with title upon which to found a claim of exemption. See FRAUDULENT CONVEYANCES, 1; *McNally v. White*, 163.

Practice.—Where the court has announced and filed special findings together with conclusions of law thereon, it is too late for defendant to raise the question as to his right of exemption. *Ib.*

EXPERT TESTIMONY—As to the soundness of mind of testator in an action to contest a will, see EVIDENCE, 12; *Stevens v. Leonard, Ex.*, 67.

As to the sanity of defendant in a prosecution for murder based upon letters written by him shortly before the homicide, see CRIMINAL LAW, 27; *Blume v. State*, 343.

As to the construction of a proposed drain, see EVIDENCE, 11; *Sauntman v. Maxwell*, 114.

In the trial of a murder case as to the phases of the moon and the condition of the atmosphere on the night of the commission of the murder, see EVIDENCE, 19; *Green v. State*, 655.

FALSE PRETENSES—Sufficiency of indictment charging defendant with obtaining money by false pretenses, see CRIMINAL LAW, 6; INDICTMENT, 1, 2; *State v. Styner*, 131; *Campbell v. State*, 303.

FALSE PRETENSES—Continued.

An indictment for obtaining property by false pretenses is not rendered bad by facts averred therein showing larceny. See **CRIMINAL LAW**, 8; *State v. Styner*, 131.

Prosecution for obtaining a gift by false pretenses, see **CRIMINAL LAW**, 49. *Ib.*

FEDERAL COURT—Sufficiency of petition for the removal of a cause to the federal courts, see **COURTS**, 4; *Green v. Heaston, Rec.*, 127.

FORMER ADJUDICATION—The answer of former adjudication is not founded on the pleadings in the former suit. See **PLEADING**, 5; *McCarty v. Kinsey*, 447.

Slander.—Superior Courts. — Jurisdiction. — The Marion Superior Court has no jurisdiction of actions for slander, and a judgment for defendant in such court in an action for damages for assault and battery and slanderous words used by defendant during the altercation, will not constitute a bar to an action in the circuit court for slander. *Ib.*

FRANCHISES—When street railroad company will be required to pave between its tracks under a franchise granting it the right to occupy the streets of a city, see **STREET RAILROADS**; *Cambria Iron Co. v. Union Trust Co.*, 291.

FRAUD—Cannot be presumed in an action to set aside a transfer of personal property as fraudulent. See **FRAUDULENT CONVEYANCES**, 4, 5; *American Varnish Co. v. Reed*, 88.

1. *Must be Found as a Fact. — Fraudulent Conveyances.* — Where fraud is essential to a recovery or a defense, it must, where there is a special finding or special verdict, be found as a fact, and a finding that property worth \$800 was transferred by an insolvent to his surety on a note, for \$200 less than the value, is not equivalent to a finding that the sale and transfer was fraudulent. *Owens v. Gascho*, 225.
2. *Vendor and Purchaser. — Quieting Title. — Special Finding.* — In an action to rescind a contract and quiet title to real estate given in exchange for city lots, the facts found showed that plaintiff employed a real estate agent to negotiate a sale or exchange of his farm for city property; that the agent pointed out certain lots, and informed plaintiff that M., the owner, would exchange them for his farm, and delivered to plaintiff a deed conveying to him certain described lots, representing that they were the same lots shown him, when in fact the lots described in the deed were situated about three miles further out, in an open prairie, and of much less value than those pointed out; that the agent was the real owner of the lots, and that there was no such person as M. Held, that the facts found justified the conclusion that the conveyance was procured by fraud, and that plaintiff's title to his land was not divested thereby. *Rohrof v. Schulte*, 133.
3. *Vendor and Purchaser.* — A vendor of land, who by false representations deceived a purchaser in respect to its location, will not be permitted, in an action by the purchaser to rescind the sale, to excuse his fraudulent acts by the negligence of the purchaser in not examining some map or record from which he might have ascertained the true location of the land, or in otherwise failing to make an investigation or inquiry by which the falsity of such representations might have been exposed. *Ib.*

FRAUDULENT CONVEYANCES.—When fraud must be found as a fact, see **FRAUD**, 1; *Owens v. Gascho*, 225.

1. *Exemption.*—A decree setting aside a conveyance of real estate as fraudulent against the rights of grantor's creditors does not re-invest grantor with title upon which to found a claim that the land, or the proceeds arising from the sale thereof, be awarded or set apart to him by virtue of the exemption statute.

McNully v. White, 163

2. *Order of Sale. — Execution.*—In an action by creditors assailing a fraudulent transfer of property, the court may by its decree direct that the property be sold upon an order of sale instead of an execution. *Ib.*

3. *Action to Set Aside. — Burden of Proof. — Evidence. — Notice. — Sales.*—In an action to set aside a sale and transfer of personal property as fraudulent as against creditors, the burden of proof is upon plaintiff to establish that defendant sold and transferred the property with the fraudulent intent to hinder or delay his creditors, and that the purchaser paid no consideration therefor, or, if he paid a valuable consideration, that he purchased with notice or knowledge of the fraudulent intent of the seller. *American Varnish Co. v. Reed*, 88.

4. *Fraud. — Presumptions.*—Fraud cannot be presumed in an action to set aside a transfer of personal property as fraudulent, but is a question of fact which must be proved. *Ib.*

5. *Fraud. — Presumptions.*—Where in an action to set aside a transfer of personal property as fraudulent the facts are consistent with either honesty and good faith or dishonesty and bad faith, the presumption of honesty and good faith will prevail. *Ib.*

HABEAS CORPUS.

1. *Justices of the Peace.*—Where the justice of the peace before whom defendant was tried and convicted had jurisdiction of the subject-matter of the action, and of the person of the defendant, no formal error or irregularity in the proceedings of the justice would authorize the discharge of the defendant on a writ of *habeas corpus*. *Pritchett v. Cox*, 108.

2. *Sufficiency of Affidavit.*—The sufficiency of the affidavit upon which defendant was convicted cannot be raised in a *habeas corpus* proceeding. *Ib.*

3. *Collateral Attack. — Special Judge.*—A writ of *habeas corpus* is a collateral remedy, and in an assault upon a judgment rendered by a court of competent jurisdiction, it will be presumed on appeal, in the absence of any showing to the contrary in support of a motion to quash the writ, that the court had full jurisdiction of the subject-matter, and that all the proceedings were according to law, and such presumption applies with equal force to the appointment of a special judge. *Crawford v. Lawrence*, 288.

HARMLESS ERROR.—When the overruling of a demurrer to an answer was harmless, see **PRACTICE**, 1, 3, 4; *Bruce v. Osgood*, 375; *Garrett v. Bissell, etc., Works*, 319; *Pittsburgh, etc., R. Co. v. Hawks*, 547.

In sustaining demurrer to good paragraph of pleading, see **APPEAL AND ERROR**, 53; *Field v. Noblett*, 357.

HIGHWAYS.—See **DEDICATION**; **EASEMENTS**.

When owner of real estate may maintain an action to enjoin the obstruction of a highway adjoining his premises, see **INJUNCTION**, 4, 5; *Martin v. Marks*, 549.

INSTRUCTIONS—Continued.

2. *Correction.*—An erroneous instruction cannot be cured by another instruction which correctly stated the law.
Chicago, etc., R. Co. v. Glover, Adm., 584.
3. *Refusal to Give.*—Available error cannot be predicated upon the action of the court in refusing to give certain instructions where the substance of each, so far as it stated the law correctly, was fully given in the charge of the court.
Whitney v. State, 573.
4. *Harmless Error.*—Available error cannot be predicated upon the action of the court in giving or refusing to give instructions where the answers to interrogatories show that the complaining party was not injured thereby.
Roush v. Roush, 562.
5. *Reasonable Doubt.—Criminal Law.*—An instruction in a criminal case informing the jury that if any one of them entertained a reasonable doubt upon the evidence "the jury in such case cannot find the defendant guilty." was a misleading and inaccurate statement of the law, and was properly refused.
Shenkenberger v. State, 630.

INSURANCE—

Collection of Assessments.—Beneficial Associations.—Assessments against members of a beneficial association for the benefit of a beneficiary of a deceased member cannot be enforced by suit, where the only penalty provided in the contract for non-payment was the forfeiture of the defaulting member's certificate and all benefits thereunder.
Gibson v. Megrew, 273.

INTERPLEADER—Petition of intervention by one interested in the subject-matter of the pending action, see **PARTIES**, 2; *Cambria Iron Co. v. Union Trust Co., 291.*

INTERROGATORIES TO JURY—

1. *General Verdict.—Conflict.*—Answers to interrogatories cannot be aided by any presumptions or intendments as against a general verdict.
Roush v. Roush, 562.
2. *General Verdict.—Easements.—Quieting Title.*—An answer to an interrogatory in an action to quiet title to an easement in a way and to remove an obstruction placed there by defendants that the parties under whom plaintiff claimed title had conveyed the right of way over the same strip of ground to a third party is not in irreconcilable conflict with a general verdict for plaintiff. *Id.*

JUDGES—

Appointment of Special Judge.—Habeas Corpus Proceeding.—The regular judge of a circuit or superior court has authority under the statute to appoint a special judge to hear and determine a *habeas corpus* proceeding.
Crawford v. Lawrence, 288.

JUDGMENTS—It is the duty of a court to give full faith and credit to a judgment, fair on its face, rendered by a domestic court of coördinate jurisdiction. *Bruce v. Osgood, 376.*

Setting aside an order of court on account of fraud made in the settlement of decedent's estate, see **COMPROMISE AND SETTLEMENT**; *Jones v. Mayne, 400.*

JUDGMENTS—Continued.

An order of court dismissing a supplemental petition in a drainage proceeding after the work was established and the assessments approved was a final judgment. See **DRAINS**, 15; *Osborn v. Maxinkuckee, etc., Co.*, 101.

When judgment for personal injury will not be reversed as excessive, see **APPEAL AND ERROR**, 57; *City of Goshen v. Alford*, 58.

1. *Complaint.*—Where a complaint challenged defendant to show any cause he had why a judgment should not be enforced against certain land, the judgment ordering a sale of the land bound every interest defendant had in the land. *Bruce v. Osgood*, 376.
2. *Collateral Attack.*—The judgment of the circuit court that it had jurisdiction of a certain case is impervious to collateral attack. *Ib.*
3. *Review.—Complaint.*—A complaint to review a judgment for error of law must specifically set forth the ruling of the court relied upon as error, and the facts upon which such ruling is based. *Wabash R. Co. v. Young*, 24.
4. *Review.—Complaint.—Exhibits.*—A complaint to review a judgment must state enough of the pleadings or the nature or character thereof to present the question of the alleged error without resorting to the exhibits filed with the complaint. *Ib.*
5. *Verity.—Courts.—Probate of Will.*—Where a will was admitted to probate upon the testimony of a subscribing witness that testatrix was an inhabitant of such county immediately previous to her death, and the judgment confirming the probate thereof was fair on its face, the clerk of such county cannot be required under §2753 Burns 1894 to produce the will for probate in another county, although the testatrix immediately before her death was an inhabitant of the latter county, since it was the duty of the court of the latter county to accept the record of the court of the former county as true. *Cunningham v. Tuley*, 270.

JURISDICTION—Of drainage proceedings, see **DRAINS**, 4; *Sauntman v. Maxwell*, 114.

The Marion Superior Court has no jurisdiction of actions for slander. See **FORMER ADJUDICATION**; *McCarty v. Kinsey*, 447.

JUSTICES OF THE PEACE—Release of defendant on writ of *habeas corpus*, see **HABEAS CORPUS**, 1, 2; *Pritchett v. Cox*, 108.

1. *Change of Venue.—Costs.*—Payment of costs is a condition precedent to the right of change of venue in actions before justices of the peace. *State, ex rel., v. Nickerson*, 439.
2. *Arrest of Judgment.—Criminal Law.—Habeas Corpus.*—Motions in arrest of judgment are not authorized by the act regulating criminal procedure before justices of the peace, and it cannot be urged in a *habeas corpus* proceeding that there was no judgment upon which to commit defendant because the justice of the peace sustained a motion in arrest of the judgment. *Pritchett v. Cox*, 108.
3. *Judgment.—Commitment of Defendant.—Criminal Law.*—Although it is the duty of a justice of the peace to commit a defendant to jail who does not immediately pay or replevy a fine adjudged against him, a mittimus issued 105 days after the judgment was rendered is not void. *Ib.*

LARCENY—One may be properly convicted of larceny under an indictment charging robbery. See **CRIMINAL LAW**, 8; *Duffy v. State*, 250.

LIBEL—

Complaint.—*Innuendo.*—It is the office of the innuendo to explain, not to extend or enlarge, the meaning of the words used, and if words not libelous *per se* are charged, the absence of inducement, showing by extrinsic matter that the words are actionable, is not supplied by an innuendo attributing to the words a meaning which renders them actionable. *Garrett v. Bissell, etc., Works*, 319.

LIENS—When liens against a street railroad company for street improvements are paramount to a mortgage, see **MORTGAGES**, 8, 4; *Cambria Iron Co. v. Union Trust Co.*, 291.

LIMITATION OF ACTIONS—

4. *Decedents' Estates.*—*Childless Second Wife.*—Since the title of the children by a former marriage to the interest of a childless second or subsequent wife in the real estate of their father does not vest until her death, their right to maintain an action for the recovery thereof is not barred by the statute of limitations previous to her death. *Bell v. Shaffer*, 413.

MANDAMUS—Mandamus is the proper remedy to enforce the right of a citizen of the county to examine the records in the county auditor's office. See **COUNTIES**, 2; *State, ex rel., v. King, Aud.*, 621.

MARION SUPERIOR COURT—Has no jurisdiction of actions for slander. See **FORMER ADJUDICATION**; *McCarty v. Kinsey*, 447.

MASTER AND SERVANT—

1. *Negligence.*—*Railroads.*—*Pleading.*—*Notice of Defects.*—A complaint alleging that defendant negligently constructed a side-track, and ordered decedent, an engineer, to run his engine over it, and that decedent, without fault on his part, was killed by the overturning of the engine as a result of the giving way of the side-track is bad on demurrer in the absence of an allegation that decedent had no knowledge of the defective condition of the side-track.

Cleveland, etc., R. Co. v. Parker, Adm., 153.

2. *Negligence.*—*Scope of Employment.*—A complaint in an action against a railroad company for the death of a freight conductor caused by a trestle giving way, alleged that decedent in charge of a train arrived late at night at a station about a mile from the trestlework, and was informed by the superintendent of the road of a severe rain-storm, and of his apprehended danger to the road at a culvert about halfway between the station and the trestle, and at another point beyond the trestle, but nothing was said about the trestle; that the conductor detached the locomotive, and with the engineer, fireman, brakeman and road superintendent, started forward to inspect the road at said points, found the first culvert uninjured and proceeded to the second, and on attempting to cross the trestle, it gave way and the conductor was killed. *Held*, that the action of the conductor was not such a departure from the work he was employed to perform as to warrant the court in ruling as a matter of law that he was thereby guilty of negligence.

Terre Haute, etc., R. Co. v. Fowler, Adm., 682.

MASTER AND SERVANT—Continued.

8. *Railroads.—Negligence.—Instruction.*—An instruction in an action against a railroad company for the death of an employe caused by the alleged negligence of defendant in maintaining a defective foot-board on its engine which gave way and caused the death of the employe, wholly ignoring decedent's knowledge of the defect, and authorizing a verdict for plaintiff even though the decedent may have had knowledge of the defect or danger, or could have had such knowledge by the exercise of ordinary care, was erroneous. *Chicago, etc., R. Co. v. Glover, Adm., 584.*
4. *Trade Secret.—Injunction.*—Where a company engaged in the manufacture of paper bags employed a person to work in its factory who had partially completed a paper bag machine, with the understanding that the employe should complete the machine at the expense of the company, and that the machine when completed should belong to the company as a trade secret, an action may be maintained by the company to enjoin the employe and others assisting him from manufacturing the machine for the use of others. *Westervelt v. National Paper, etc., Co., 673.*
5. *Trade Secret.—Injunction.*—Where one employs another to work for him in a business in which he makes use of a secret process, or of machinery invented by himself, or by others for him, the nature and particulars of which he desires to keep a secret, of which desire the employe has notice, the law will imply a promise to keep the employer's secret, and any attempt on the part of the employe to use the secret process or machinery, or communicate the secret to others, will be enjoined by a court of equity. *Id.*

MECHANICS' LIENS—

Foreclosure.—Counterclaims.—Attorney's Fees.—Where in an action by contractors to enforce mechanics' liens the court found that after the payment of liens of subcontractors and material men, and the allowance of claims of defendant on account of non-performance of the contract on the part of plaintiffs there was nothing due the plaintiffs, the payment of their claims extinguished their lien, and there was no basis for the allowance of attorney's fees. *Bird v. St. John's Episcopal Church, 138.*

MISCONDUCT OF COUNSEL—

1. *Waiver.—Appeal and Error.*—A cause will not be reversed because of the alleged misconduct of counsel where the statements objected to were promptly withdrawn by the court from the consideration of the jury and no motion to set aside the submission and discharge the jury was made. *Shenkenberger v. State, 630.*
2. *Instructions.*—The refusal of the court specifically to instruct the jury to disregard a remark made by counsel was not error, where the jury were instructed generally not to pay any attention to side remarks in the case. *Roush v. Roush, 562.*
3. *New Trial.*—Defendant was not entitled to a new trial on account of the misconduct of the prosecuting attorney in referring in his argument to the failure of the defendant to testify, where the court sustained defendant's objection to the statement, and instructed the jury that the remark was improper, and that the failure of defendant to testify should not be considered by them, and the defendant proceeded with the trial without any motion to set aside the submission and discharge the jury. *Blume v. State, 343.*

MISCONDUCT OF COUNSEL—Continued.

4. *Argument.—Criminal Law.*—Overruling an objection to statement by the prosecuting attorney in his argument to the jury in a prosecution for assault with intent to kill, that the defendant drew his revolver the prosecuting witness ran, "and was well for him that he did run, when you consider the character of the defendant as shown by the evidence," is not reversible error, since the word "character" was, perhaps, inaccurately used instead of "disposition," and the allusion was not to the impeaching testimony, but to the evidence of his actions and behavior at the time of the assault. *Keesier v. State, 24.*

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Anti-Trust Law.—Corporations.—The anti-trust law of 1897 is prospective and does not apply to contracts entered into before the law took effect. *Sterling Remedy Co. v. Wyckoff, 4.*

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When mortgage executed by husband and wife upon real estate formerly held by them as tenants by entireties is voidable, see **HUSBAND AND WIFE, 2**; *Government Building, etc., Institution v. Denny, 261.*

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Cambria Iron Co. v. Union Trust Co., 591.

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MORTGAGES—Continued.

material furnished for paving between the company's tracks as preferential to the mortgage, on the theory that the company materially increased the value of its property after the execution of the mortgage, is insufficient, where it is not alleged that the increase in value was made from the current earnings of the company. *Ib.*

MOTIONS—Motions to make complaint more specific and the ruling of the court thereon must be made part of the record by bill of exceptions or by order of court. See *APPEAL AND ERROR*, 28 *Pittsburgh, etc., R. Co. v Indiana Horseshoe Co.*, 322.

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1. *Street Improvements. — Constitutional Law.*—The imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the fourteenth amendment to the federal Constitution.

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7. *Street Improvements. — Constitutional Law.*—Property owners affected by a street improvement within a taxing district are entitled to a hearing on the question of special benefits. *Ib.*

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MUNICIPAL CORPORATIONS—Continued.

9. *Street Improvements.—When Assessments Exceed Benefits.*—Where in adjusting assessments for street improvements it is found that the total cost of the improvement exceeds the total sum of special benefits accruing therefrom the deficit must be provided from the general revenues of the city under §4292 Burns 1894. *Ib.*
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 3. *Violation of City Ordinance.—Proximate Cause.—Complaint.*—A complaint in an action for personal injuries charging the violation of a city ordinance as one of the elements of defendant's negligence is not rendered bad by its failure to show that the violation of the ordinance was the proximate cause of plaintiff's injury. *Ib.*
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Terre Haute, etc., R. Co. v. Fowler, Adm., 682.

NEW TRIAL—On account of the misconduct of counsel, see MISCONDUCT OF COUNSEL, 3, 4; *Blume v. State*, 343; *Keesier v. State*, 242.

1. *Newly Discovered Evidence*.—Where in an application for a continuance on account of the absence of a witness the defendant stated in an affidavit filed in support of the application what he expected to prove by the absent witness, a new trial will not be granted on account of newly discovered evidence of such witness.
Whitney v. State, 573.
2. *Newly Discovered Evidence*.—A new trial will not be granted on account of newly discovered evidence, where such evidence is intended only for the purpose of impeachment. *Ib.*
3. *Verdict Not Sustained by Sufficient Evidence*.—That "the verdict is not sustained by sufficient evidence" is the proper and statutory cause for which a new trial may be demanded, and it is not necessary, in addition thereto separately to assign that "the verdict is contrary to the evidence."
Stevens v. Leonard, Ex., 67.

NOTICE—When appearance by co-party cures defect of notice, see APPEAL AND ERROR, 1; *Cambria Iron Co. v. Union Trust Co.*, 291.

OFFICERS—See SHERIFF.

Right of taxpayer to examine the records of public officers, see COUNTIES, 1, 2, 3; *State, ex rel., v. King, Aud.*, 621.

1. *Failure to Qualify—School Trustees*.—Where one appointed as school trustee failed to qualify within the time fixed by statute, and the town trustees appointed another person to fill the office, the title of the former to the office was thereby forfeited, and his attempt to qualify thereafter did not revive or restore his title.
Minnick v. State, ex rel., 379.
2. *Township Assessor. — Vacancy. — Appointment. — Election of Successor*.—Under the provision of §8508 Burns 1894, that township assessors elected or appointed shall continue in office until the next township election, and until their successors are elected and qualified, one appointed as assessor in August, 1898, to fill a vacancy caused by death was entitled to hold the office, by virtue of the act of 1897 (Acts 1897, p. 64), changing the time of holding the election of township trustees and assessors from November, 1898, to the general election in November, 1900, until his successor was elected and qualified in November, 1900.
State, ex rel., v. Burke, 645.

OPINION EVIDENCE—As to the sanity of defendant in a prosecution for murder, see CRIMINAL LAW, 30; *Blume v. State*, 343.

OVERRULED CASES—*Gurley v. Park*, 135 Ind. 440, see *Kern v. Kern*, 29; *Spencer v. Spencer*, 136 Ind. 414, see *Gates v. Baltimore, etc., R. Co.*, 338.

PARTIES—A defect of parties appearing on the face of a complaint which is not taken advantage of by demurrer is waived. See APPEAL AND ERROR, 8; *Carskaddon v. Pine*, 410.

In an appeal from a judgment establishing a drain, see APPEAL AND ERROR, 7; *Ex Parte Sullivan*, 440.

When an insolvent corporation is not a necessary party to an appeal from the distribution of its property, see APPEAL AND ERROR, 5; *Mueller v. Stinesville, etc., Stone Co.*, 230.

PARTIES—Continued.

An appellant in a vacation appeal must join all of his co-parties, or the appeal will be dismissed. See **APPEAL AND ERROR**, 4; *Owen v. Dresback*, 392.

Parties to a judgment whose interests are adverse to that of one appealing from such judgment must be made parties to the appeal. See **APPEAL AND ERROR**, 3; *Capital Nat. Bank v. Reid, Adm.*, 54.

1. *Defect*.—An objection to a complaint that defendant was sued by the wrong name cannot be made by demurrer for want of facts. *Bird v. St. John's Episcopal Church*, 138.

2. *Interpleader*.—*Practice*.—*Petition*.—*Sufficiency*.—One not a party, having an interest in the subject-matter of a pending action that may be adversely affected by the suit, will be permitted, upon a proper showing, under §273 Burns 1894, to come into the case for the protection of his interests, and such petition of intervention need not be as formal as a complaint, and is sufficient if it contains a succinct statement of the facts upon which the equities claimed are predicated. *Cambria Iron Co. v. Union Trust Co.*, 291.

PARTITION—Defense by remote grantor, see **APPEAL AND ERROR**, 6; *Ladd v. Kuhn*, 313.

Attorney's Fees.—Section 1222 Burns 1894 providing for the taxing of attorney's fees in a partition proceeding against all of the parties is not mandatory, but such taxation is to be awarded in such proportions against each of the parties as the court may determine.

Bell v. Shaffer, 413.

PERSONAL INJURIES—Knowledge of danger on the part of plaintiff, see **CONTRIBUTORY NEGLIGENCE**, 3; *City of Huntington v. Folk*, 91.

PLEADING—See COMPLAINT; PRACTICE.

An amended pleading supersedes the original, and the latter goes out of the record and cannot be considered on appeal unless brought into the record by bill of exceptions. See **APPEAL AND ERROR**, 85; *City of Huntington v. Folk*, 91.

Sufficiency of answer of suretyship by wife in an action to foreclose a mortgage upon her separate real estate, see **HUSBAND AND WIFE**, 5; *Field v. Noblett*, 357.

Petition of intervention by one interested in the subject-matter of the pending action, see **PARTIES**, 2; *Cambria Iron Co. v. Union Trust Co.*, 291.

1. *Complaint*.—*Omission of Material Averment Not Cured by Verdict*.—The omission of a material averment of fact from a complaint is not cured by a finding of the omitted fact in the special verdict. *Cleveland, etc., R. Co. v. Parker, Adm.*, 153.
2. *Demurrer*.—*Insane Persons*.—A cross-complaint which affirmatively shows the cross-complainant's want of capacity to maintain his suit is not bad as against a demurrer for want of facts. *Aetna Life Ins. Co. v. Sellers*, 371.
3. *Demurrer to Answer in Abatement*.—A demurrer to an answer in abatement does not search the record, and cannot be carried back and sustained to the complaint. *Goldsmith v. Chipps*, 28.

PLEADING—Continued.

4. *Exhibits.*—The plans and specifications referred to in a building contract were not parts of the contract in such sense as to require that they should be filed as exhibits with a complaint on the contract. *Bird v. St. John's Episcopal Church, 138.*
5. *Former Adjudication.*—The answer of former adjudication is not founded on the pleadings in the former suit, and it is not necessary to file with such answer a copy of the pleadings in the former suit as an exhibit. *McCarty v. Kinsey, 447.*
6. *Insane Persons. — Contracts. — Disaffirmance.*—A complaint by an insane person, not under guardianship, seeking the foreclosure of a mortgage which had been released of record, disclosing grounds on which the release might have been disaffirmed, but not pleading a disaffirmance of the release, discloses no right of action. *Ætna Life Ins. Co. v. Sellers, 370.*
7. *Contracts. — Non-performance.*—Averments in a complaint to recover the amount due on a building contract that plaintiffs fully performed the conditions of the contract on their part, excepting the condition thereof requiring them to obtain the certificate of the supervising architect that the work was completed under the terms of the contract, and that after the work was finished they demanded the certificate, and notified defendants of their demand, requesting them to cause the certificate to be delivered, but that the same was refused, show a sufficient excuse for the failure of plaintiffs to procure the certificate. *Bird v. St. John's Episcopal Church, 138.*

PRACTICE—Petition of intervention by one interested in the subject-matter of the pending action, see **PARTIES, 2**; *Cambria Iron Co. v. Union Trust Co., 291.*

Saving exceptions to the ruling of the court excluding answers to questions propounded to a witness, see **EVIDENCE, 3**; *Shenkenberger v. State, 630*; *Siple v. State, 647*; *Whitney v. State, 573.*

A party does not waive his exception to the conclusions of law by subsequently moving the court to add to the finding certain facts which were in evidence. See **APPEAL AND ERROR, 48**; *Jones v. Mayne, 400.*

1. *Harmless Error.*—Overruling a demurrer to an answer was harmless where defendant was entitled to introduce under the general denial his whole defense to the paragraph of complaint to which the answer was addressed if plaintiff's evidence fails to make out a case. *Bruce v. Osgood, 575.*
2. *Pleading. — Defective Demurrer. — Abatement.*—Where the facts stated in an answer in abatement were insufficient to abate the action, the action of the court in sustaining a demurrer thereto was harmless, although the demurrer was so defective in form that it could have been disregarded by the court. *Goldsmith v. Chipps, 28.*
3. *Harmless Error.*—Available error cannot be predicated upon the action of the court in sustaining a demurrer which was defective in form, where the complaint to which it was addressed was insufficient for want of facts. *Garrett v. Bissell, etc., Works, 319.*
4. *Harmless Error.*—Where all the evidence admissible under a special answer could have been given under the general denial

PRACTICE—Continued.

which was pleaded, sustaining a demurrer to the special answer is not rendered harmful by the subsequent withdrawal of the general denial. *Pittsburgh, etc., R. Co. v. Hawks, 547.*

5. *Harmless Error*—Overruling a demurrer to a complaint against an executor to require him to pay taxes due from the estate in which the amount claimed to be due exceeded the amount of money in the hands of the executor was harmless, where the recovery was for an amount less than that shown to be in the hands of the executor. *Gallup, Ex., v. Schmidt, Treas., 196.*

PRINCIPAL AND SURETY—An insolvent may prefer and save harmless a surety on a note by transferring to him personal property. See **INSOLVENCY**; *Owens v. Gascho, 225.*

In action on a note executed by the wife alone, and secured by mortgage upon her separate real estate, the burden is upon defendant to allege and prove that she was surety and not principal. *Field v. Noblett, 357.*

PRISONER—Liability of sheriff for taking and circulating photograph and description of prisoner, see **SHERIFF**, 1, 2; *State, ex rel., v. Clausmeier, 599.*

QUIETING TITLE—Sufficiency of complaint in an action to quiet title to an easement in a way adjoining plaintiff's premises, see **EASEMENTS**, 1; *Roush v. Roush, 562.*

In an action to rescind the contract and quiet title to real estate on account of fraud in procuring a conveyance thereof, see **FRAUD**, 2, 3; *Rohrof v. Schulte, 183.*

1. *Tax Title*.—Title acquired by a tax deed is not destroyed by the grantee accepting a deed to the property from one claiming a life interest therein. *Doren v. Lupton, 396.*
2. *Claim for Improvements*.—In the trial of an action to quiet title to real estate, evidence as to the value of the land and improvements made by defendant was properly excluded where no claim for improvements was made by the pleadings. *Ib.*
3. *Evidence—Taxes*.—Evidence that the rental value of the real estate exceeded the taxes assessed against it was improperly admitted in the trial of an action to quiet title to real estate, where defendant held title under a tax deed and a deed from one claiming a life interest in the real estate, and had not filed an affirmative pleading under the occupying claimant's act to recover for the improvements and taxes. *Ib.*

RAILROADS—Action by railroad company to restrain a city from paving a portion of its right of way claimed by defendant as part of a street, see **DEDICATION**, 5; *Baltimore, etc., R. Co. v. City of Seymour, 17.*

1. *Fires. — Evidence. — Negligence.* — In an action for damages for the destruction of property by fire escaping from defendant's railroad, plaintiff is not required to prove by direct evidence that the fire started on its right of way, and that defendant was negligent in permitting the fire to escape therefrom.

Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 322.

RAILROADS—Continued.

2. *Fires.—Negligence.*—Where a railroad company permitted dry grass and weeds and other combustible material to accumulate upon its right of way, it is liable for damages to property caused by fire spreading therefrom, although it had no knowledge of the existence of the fire. *Ib.*
3. *Construction of Side-Track.—Care of.—Contract.*—A contract between a railroad and manufacturing company for the construction of a side-track to the factory, wherein the manufacturing company agreed "to exercise the greatest care in the management of the siding herein provided for; to prevent cars or other obstructions from getting out upon, or too close to, the main or other tracks; to secure the safe closing and locking of the main switch or switches, and to keep the inner safety switch in proper position; also to use such means and care generally as will tend to avoid accidents of any kind," did not require the manufacturing company to keep the tracks belonging to the railroad company clear of rubbish and combustible material. *Ib.*
4. *Liability for Injury of Licensee.*—A mere licensee injured in the dark by falling into a pit while crossing certain premises of a railroad company cannot recover damages of such company, unless the injury is shown to be wilful on the part of the company. *Lingenfelter v. Baltimore, etc., R. Co., 49.*

RECEIVERS—

Sale of Mortgaged Property.—Transfer of Liens.—Priorities.—Where, after rendering judgment and decree foreclosing mortgages, the court ordered the mortgaged property sold by a receiver without specifically directing that the property should be sold to pay off the adjudged liens, the liens are extinguished in the property, and transferred to the fund arising therefrom, and the allowance of a claim not shown to be entitled to priority, filed by an intervener after the receiver's sale, in preference to the adjudicated liens, was erroneous, although the adjudged lienors did not file claims with the receiver after the sale. *Mueller v. Stinesville, etc., Stone Co., 230.*

ROADS—See HIGHWAYS.

ROAD SUPERVISOR—May be compelled by mandate to remove obstructions in public highway. See **HIGHWAYS**, 4; *Martin v. Marks, 549.*

ROBBERY—One may be properly convicted of larceny under an indictment charging robbery. See **CRIMINAL LAW**, 8; *Duffy v. State, 250.*

SALES—See VENDOR AND PURCHASER.

Bill of Sale.—Record.—A bill of sale evidencing the sale of personal property need not be recorded where the property is delivered to the purchaser. *Owens v. Gascho, 225.*

SCHOOL TRUSTEES—Failure to qualify within the time fixed by statute, see **OFFICERS**, 1; *Minnick v. State, ex rel., 379.*

SHERIFF—

1. *Prisoner.—Taking Photograph.—Damages.*—A sheriff may take the photograph of a prisoner, ascertain his height, weight, name, residence, place of birth, occupation, and the color of his eyes, hair, and beard, if he deem it necessary to secure his safe keeping.

SHERIFF--Continued.

or to recapture him more readily should he escape, without becoming liable in damages therefor, where no force or violence was used. *State, ex rel., v. Clausmeter, 599.*

2. *Circulating Photograph and Description of Prisoner.—Liability on Official Bond.*—A sheriff in sending out photographs and descriptions of a prisoner in his custody to police departments and individuals is not acting in an official capacity and is not liable on his official bond therefor. *Ib.*

SIGNATURE—To a contract for the construction of a church building, see **CONTRACTS**, 6; *Bird v. St. John's Episcopal Church, 138.*
Of judge to the special finding of facts, see **SPECIAL FINDING**, 5, 6; *Martin v. Marks, 549.*

SLANDER—The Marion Superior Court has no jurisdiction of actions for slander. See **FORMER ADJUDICATION**; *McCarty v. Kinsey, 447.*

SPECIAL FINDING—

1. *Injunction.—Obstruction of Highway.*—In an action to recover damages for the obstruction of a highway adjoining plaintiffs' premises and enjoining its continuance, it was not necessary or proper for the court to find the amount the real estate was damaged by the obstruction on the theory that it was permanent. *Martin v. Marks, 549.*
2. *Railroads.—Right of Way.—Title.—Injunction.*—In an action by a railroad company to enjoin other companies from appropriating its right of way, a finding that the original owner of the land platted same, and the land in question appeared by the plat to be a street, does not overcome other findings showing plaintiff to be the owner in fee of the land, where it was not shown that the street was ever accepted by the public, and the street was never used, opened or improved, and could not be, on account of the topography of the place. *Peoria, etc., R. Co. v. Attica, etc., R. Co., 218.*
3. *Evidence.*—A finding as to the distance defendant's fence encroached upon the highway will not be disturbed on appeal, although no witness testified to the exact distance found by the court, where the distance found was within those testified to by the witnesses. *Martin v. Marks, 549.*
4. *Evidence.—Highways.—Obstruction.*—A finding in an action to enjoin the obstruction of a highway with a fence that by reason of the obstruction ingress and egress to and from plaintiffs' premises was more difficult and dangerous, and required more time in effecting a passage through the gateway is sustained by evidence that in driving out of the gate the horses were not disposed to approach near the new fence on account of the barbed wire along the top thereof, that one had to drive carefully, and back, to get through the gate into the highway without cramping the wagon, and that they broke corners off of hay ladders in going in, and often had to lift the end of the wagon over to get in. *Ib.*
5. *Signature of Judge.*—The signature of the judge to the conclusions of law following immediately after the special finding of facts constitutes a sufficient signing of the special finding of facts, where the record shows that the conclusions of law and special finding of facts constituted one written instrument. *Ib.*

SPECIAL FINDING—Continued.

6. *Failure of Judge to Sign.—Venire De Novo.*—The failure of the trial judge to sign the special finding of facts is not ground for a *venire de novo*, since under such circumstances the finding will be treated as a general finding. *Ib.*

SPECIAL JUDGE—Objections to the competency of a special judge must be made at the time, or the right to object thereto will be waived. See **APPEAL AND ERROR**, 54; *Ripley v. Mutual Home, etc., Assn.*, 155.

SPECIAL VERDICT—

1. *Judgment.—Personal Injuries.—Municipal Corporations.*—A special verdict in an action against a city for personal injuries found that the city by its workmen and agents removed certain wooden hitching-posts along the line of a public street, and left a hole from two to four feet deep, and one foot wide, with perpendicular walls, unguarded, in front of the store in which plaintiff was employed; that plaintiff while walking from the store to the street, after dark, for the purpose of entering a carriage to go home, not knowing of the existence of the hole, stepped into it, and was injured. *Held*, that judgment was properly rendered in favor of plaintiff on the special verdict. *City of Goshen v. Alford*, 58.
2. *Railroads.—Fires.—Damages.*—A finding in an action for damages for the destruction of property by fire communicated from defendant's railroad, that defendant permitted dry weeds and grass and other combustible material to be and remain upon its right of way from which fire, dropped from defendant's engines, spread to plaintiff's property, is sufficient, without a finding as to the amount and extent of the combustible material permitted to accumulate, or that permitting the weeds and grass to remain upon the track for two weeks was unnecessary, or increased the hazards to plaintiff's property. *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.*, 322.

STATUTES—Where a drainage petition was filed prior to the date of the amendment of the statute but no action was taken thereon until after the amendatory act took effect the proceeding was properly had under the amendatory act. See **DRAINS**, 18; *Sarber v. Rankin*, 236.

STATUTORY CONSTRUCTION—For table of statutes cited and construed, see page xxvii.

STREET IMPROVEMENTS—See MUNICIPAL CORPORATIONS.

When resolution for street improvement is void in part, see **INJUNCTION**, 1; *Adams v. City of Shelbyville*, 467.

When street railroad required to pave between its tracks, see **STREET RAILROADS**; *Cambria Iron Co. v. Union Trust Co.*, 291.

STREET RAILROADS—When lien for street improvement is paramount to mortgage, see **MORTGAGES**, 3, 4; *Cambria Iron Co. v. Union Trust Co.*, 291.

Franchises.—Street Improvements.—Paving Between Tracks.—A franchise granting a street railway company the right to occupy the streets of a city conditioned that the street between the tracks shall be paved "when and as the street may be paved," requires the railway company to pave the space between its tracks when the street is paved. *Ib.*

TAXATION—

1. *National Bank Stock.—Deduction of Indebtedness of Shareholder.*—The owner of stock in a national bank is not entitled to a deduction of his *bona fide* indebtedness from the assessed valuation of his stock for the purpose of taxation.
First Nat. Bank v. Turner, Treas., 456.
2. *Executors and Administrators.—Failure to Pay Taxes.—Duty of County Treasurer.*—The provision of §8587 Burns 1894 requiring the county treasurer to report to the court the delinquency of an executor or administrator in the payment of taxes due from the estate is imperative, but, in so far as the statute prescribes the time, it is directory only.
Gallup, Ex., v. Schmidt, Treas., 196.
3. *Placing Omitted Property on Tax Duplicate.—Notice.—Nonresidence.—Constitutional Law.*—Section 8560 Burns 1894 providing notice to property owners by county auditor of intention to add omitted property to tax duplicate is not unconstitutional for failure to provide notice to nonresidents, since such assessment is not final and the nonresident is not deprived of his day in court. *Ib.*
4. *Assessment of Omitted Property by County Auditor.—Correction by Court.*—Where the county auditor in placing omitted property on the tax duplicate for taxation deducted therefrom an amount which would produce an amount voluntarily paid by testator's executor, the court erred in again deducting such sum from the amount assessed against the estate by the auditor, since if the assessment was improper it should have been set aside *in toto*. *Ib.*
5. *Executors and Administrators.—Nonresidence.—Notice.—Constitutional Law.*—An executor residing in another state, who was present and served with notice of intention of county auditor to add to the tax duplicate omitted property belonging to the estate, under the provisions of §8560 Burns 1894, cannot assail the constitutionality of said section on the ground that it attempts to provide for the assessment and taxation of omitted property owned by nonresidents of the State, without affording such nonresident notice or a day in court. *Ib.*
6. *Placing Omitted Property on Tax Duplicate.—Notice.—Executors and Administrators.—Nonresidence.*—The official residence of an executor, so far as the taxation and administration of the assets of the estate are concerned, is in the county of his appointment, and a notice to appear before the county auditor and show cause why property of the estate should not be added to the tax duplicate, under §8560 Burns 1894, is not void for the reason that the executor resided in another state. *Ib.*
7. *Assessment of Omitted Property by County Auditor.—Penalties.*—Under the tax statutes penalties and interest can only be imposed for the nonpayment of taxes after the property has been placed upon the tax duplicate, and there is no authority for adding the penalty and interest to omitted property placed upon the tax duplicate by the county auditor which would have accrued if the property had been placed on the tax duplicates at the proper time and the taxes not paid. *Ib.*
8. *Assessment of Omitted Property by County Auditor.*—In a proceeding by the county auditor to place omitted property of testator on the tax duplicate for taxation, under the provision of §8531 *et seq.* Burns 1894, it appeared that testator from 1881 to the time of his death in 1893 had been in the banking business, loaning money and dealing in bonds; that during this time it did not appear that he made or lost any large sum of money, and he

TAXATION—Continued.

annually returned personal property for taxation varying from \$14,000 to \$24,000. At the time of his death he left a personal estate of taxable property appraised at \$383,906.46. The executor, who was the brother of testator, and practically his sole beneficiary, refused to produce testator's books and accounts, and the auditor made an assessment of omitted property, taking the amount returned by the executor as a basis, and deducted five per cent. as the probable net annual increase, and the result thus reached he took as the true amount for 1893, and from this he deducted five per cent. and took the result as the correct amount for 1891, and so on back to 1881. *Held*, that the assessment made by the auditor will be presumed to be correct, and will not be overthrown in the absence of the preponderance of the evidence to the contrary. *Ib.*

TAX TITLE—Title acquired by tax deed is not destroyed by the grantee accepting a deed to the property from one claiming a life interest therein: *Doren v. Lupton*, 396.

TENANTS BY ENTIRETIES—Deed to husband and wife "jointly," see **HUSBAND AND WIFE**, 1; *Simons v. Bollinger*, 83.

When wife will be estopped from denying the validity of a mortgage executed upon lands held as tenants by entireties, see **HUSBAND AND WIFE**, 3; *Government Building, etc., Institution v. Denny*, 261.

When mortgage on lands held by husband and wife as tenants by entireties is voidable, see **MORTGAGES**, 1, 2; *Abicht v. Searls*, 594.

TIPPECANOE SUPERIOR COURT—Has power to issue writs of mandate and prohibition. See **COURTS**, 3; *Martin v. Marks*, 549.

TRADE SECRET—When employe will be enjoined from using a trade secret, see **MASTER AND SERVANT**, 4, 5; *Westervelt v. National Paper, etc., Co.*, 673.

TRESPASS—

1. *Injunction.—Complaint.—Averment as to Ownership of Property*—A complaint in an action to enjoin defendant from trespassing upon certain described property, alleging that plaintiff purchased the property from the owner, and has ever since owned and occupied the same, is a sufficient averment of the kind and extent of plaintiff's title as against an objection made for the first time after judgment. *Peoria, etc., R. Co. v. Attica, etc., R. Co.*, 218.

2. *Injunction.—Complaint.—Railroads*—A railroad company, having purchased a canal and constructed its tracks along the tow-path of same, may maintain an action to enjoin other railroad companies that had maintained a bridge over the canal from appropriating the tow-path under the bridge on an allegation that plaintiff was the owner and in possession of the land and space under the bridge, and that defendants, forcibly and without right, were attempting to appropriate the same permanently to their own use to the exclusion of plaintiff. *Ib.*

3. *Pleading.—Title to Property*—A complaint in an action to enjoin defendants from trespassing upon canal property alleged to be owned by plaintiff, which discloses that defendants, since a time prior to the abandonment of the operation of the canal, have maintained a bridge over the property, does not amount to an admission of a superior title in defendants to the ground under the bridge. *Ib.*

TRIAL—See INSTRUCTIONS; INTERROGATORIES TO JURY; MISCONDUCT OF COUNSEL; NEW TRIAL; PRACTICE; SPECIAL FINDING; SPECIAL VERDICT; VERDICT.

1. *Admission of Evidence*.—It is within the discretion of the court to admit original testimony after the evidence and argument have been closed, and a cause will not be reversed for that reason unless it clearly appears that such discretion was abused.

Roush v. Roush, 562.

2. *Misconduct of Juror*.—*Appeal*.—Where the question of alleged misconduct of a juror was tried in the court below upon affidavits and counter affidavits, it will be presumed on appeal that the decision of the trial court was correct. *Stevens v. Leonard, Ex.*, 67.

TRUSTS—The anti-trust law of 1897 is prospective, and does not apply to contracts entered into before the law took effect.

Sterling Remedy Co. v. Wyckoff, 437.

VENDOR AND PURCHASER—See SALES.

In an action to set aside conveyance of real estate procured by fraud, see FRAUD, 2, 3; *Rohrof v. Schulte*, 183.

Vendors' Liens.—*Husband and Wife*.—*Principal and Agent*.—The purchaser of real estate at an executor's sale procured the receipt of plaintiff, an heir and beneficiary, for the amount of her interest in the estate, under the agreement that he would pay the amount thereof to her with interest, or would deed her part of the real estate in payment thereof, which receipt the executor accepted in lieu of that amount of the purchase money. The purchaser sold the land to F, whose husband as her agent had actual notice of plaintiff's claim before the deed was made and before any part of the purchase money was paid. *Held*, that the agreement giving the original purchaser the option of paying the purchase money in land did not prevent the enforcement of plaintiff's lien, and that the land was subject to said lien in the hands of the last purchaser.

Forsythe v. Brandenburg, 588.

VENIRE DE NOVO—The failure of the trial judge to sign the special finding of facts is not ground for *venire de novo*. See SPECIAL FINDING, 6; *Martin v. Marks*, 549.

VENUE—Payment of costs is a condition precedent to the right of change of venue in actions before justices of the peace.

State, ex rel., v. Nickerson, 439.

VERDICT—See SPECIAL VERDICT.

Answers to interrogatories cannot be aided by any presumptions or intendments as against a general verdict. *Roush v. Roush*, 562.

When verdict does not specify the particular offense, it will be deemed a finding of guilty of the highest offense charged. See CRIMINAL LAW, 10; *Stple v. State*, 647.

Easements.—*Quieting Title*.—A verdict in an action to quiet title to an easement in a way, and to remove obstructions placed there by defendants, that the jury find for the plaintiff, that said obstruction should be removed and plaintiff's easement in the alley quieted, and that they find against defendants on their cross-complaint, is a general verdict, determining all of the material issues in favor of plaintiff.

Roush v. Roush, 562.

WAIVER—Assignments of error which are not discussed are waived.

Smith v. State, 107; Jones v. Mayne, 400; Pittsburgh, etc., R. Co. v. Hawks, 547.

By failure to argue in original brief errors assigned on appeal, see APPEAL AND ERROR, 24; *Gates v. Baltimore, etc., R. Co., 338.*

WILLS—Probate of will in wrong county, see JUDGMENTS, 5; *Cunningham v. Tuley, 270.*

1. *Revocation by Execution of Inconsistent Will.*—The execution of a will inconsistent with a former will executed by the testator operates to revoke the first will. *Kern v. Kern, 29.*
2. *Revocation.—Revival.—Lost Will.*—Where a will has been revoked by the execution of a second will, and upon the death of the testator the second will cannot be found, the fact that the first will is found in a conspicuous place with valuable papers does not constitute a republication and revival of the first will. *Ib.*
3. *Testamentary Capacity.*—The fact that the testator was, at the time of making his will, suffering great pain, did not take away his testamentary capacity. *Stevens v. Leonard, Ex., 67.*
4. *Undue Influence.*—The fact that some of the relatives ignored by a testator in his will were poor is of itself of little weight in determining whether undue influence was exercised over the testator. *Ib.*
5. *Undue Influence.—Trial.—Instruction.*—The complaint, in a suit to contest a will, charged that such will was invalid upon the ground of the unsoundness of mind of testator, and also for undue influence in the execution thereof. Upon the trial there was no evidence that the execution of the will was procured by undue influence. *Held*, that it was not error for the court by proper instruction to withdraw from the jury the question of undue influence. *Ib.*
6. *Undue Influence.—Evidence.*—Where, on the trial of an action to contest a will, it was contended by plaintiff that the testator's antipathy for his brother was without substantial foundation, but was due to an insane delusion, it was proper to admit evidence in contradiction thereof showing that such brother had stated to a crowd that testator in his lifetime had improved every opportunity to take advantage of his brothers, and had robbed them, although it was not shown that testator had knowledge of such statement before making his will. *Ib.*
7. *Subscribing Witness.—Instruction.*—An instruction that "a person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind, and while the law will subsequently permit him to testify to the contrary, because the truth, if such it be, should be learned, yet the jury trying the case may consider the fact of such implied contradiction in weighing his testimony," is a correct statement of the law, and is not an invasion of the province of the jury. *Ib.*

WITNESSES—Evidence of attempts on the part of accused to bribe or intimidate witnesses may be considered in determining the guilt or innocence of defendant. See CRIMINAL LAW, 48; *Keesier v. State, 242.*

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